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“PARTIAL-BIRTH ABORTION” IS NOT ABORTION: *CARHART II*'S FUNDAMENTAL MISAPPLICATION OF *ROE*

Samuel W. Calhoun[*]

ABSTRACT

In explaining his constitutional objection to Wisconsin's partial-birth abortion ban, Judge Richard Posner stated:

> We . . . do not doubt that if in the course of a normal labor the mother asked her obstetrician to kill the baby in the birth canal and he did so, the state could criminalize this act as infanticide. . . . But [in a partial-birth abortion] . . . there is no issue of infanticide, of killing a live baby that is half-born.[†]

Posner thus contrasts killing during “normal labor” with partial-birth abortion. The former can be constitutionally prohibited, but the latter cannot. Why the distinction? Because to Posner the former involves “killing a live baby that is half-born,” whereas the latter does not.

This Article will show that Judge Posner is correct to assert that killing a baby in the midst of the birth process is not constitutionally protected. The Supreme Court in *Roe v. Wade* strongly implied that the abortion right is not this broad, and Judge Posner instinctively agrees.

But Judge Posner is wrong to say that partial-birth abortion does not kill “a live baby that is half-born.” This Article will demonstrate that the partial-birth procedure in fact does kill a baby during its birth. Ban proponents have therefore been cor-

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[*] Professor of Law, Washington and Lee University School of Law. The author thanks Stephen Calhoun, Teresa Collett, Stephen Gilles, Allan Ides, Doug Kmiec, Ann Massie, Rick Schlauch, David Smolin, Richard Stith, and Robin Wilson for their help. Thanks also to Bridget Fay and Sam Huang for their valuable research assistance. The author benefited from presenting a preliminary version of this Article at the Eighteenth University Faculty for Life Conference. The author also appreciates the financial assistance provided by the Frances Lewis Law Center, Washington and Lee University School of Law.

[†] Planned Parenthood of Wis. v. Doyle, 162 F.3d 463, 471 (7th Cir. 1998).

rect in their long-standing argument that the partial-birth procedure is not really an abortion. Consequently, *Roe*, properly understood, is inapplicable to partial-birth abortion bans.

Courts, however, including the United States Supreme Court in *Carhart II*, have nonetheless routinely used *Roe/Casey*'s analytical framework to evaluate bans. This common mistake undermines current partial-birth abortion jurisprudence. The rational basis test, not *Roe/Casey*, is the proper evaluative tool. Using the correct standard could have significant consequences for future challenges to the Federal Ban and to the bans of the various states.

INTRODUCTION

The 2007 United States Supreme Court decision in *Gonzales v. Carhart* [*Carhart II*][1] would seem to end the long fight over partial-birth abortion. Ever since the 1992 disclosure of the details of the partial-birth procedure—which Congress later described as "gruesome and inhumane"[2]—the majority of Americans, both pro-choice and pro-life, have favored prohibiting it.[3] While ban proponents experienced widespread success in enacting partial-birth abortion bans,[4] almost all were stricken as unconstitutional under *Roe v. Wade,*[5] as modified by *Planned Pa-*

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[1] 550 U.S. 124 (2007). *Carhart II* will hereinafter be used to refer to the *Gonzales* decision, which upheld the Federal Partial-Birth Abortion Ban.

[2] Congressional Finding 14(L), in notes following 18 U.S.C. § 1531 (Supp. V 2000). This same descriptive phrase was used earlier by the first court to rule on the enforceablity of a state partial-birth abortion ban. Evans v. Kelly, 977 F. Supp. 1283, 1319 n.38 (E.D. Mich. 1997). An earlier decision barred enforcement of an Ohio statute that no doubt was motivated by the partial-birth controversy, but was so drafted that it cannot accurately be called a partial-birth abortion ban. *See* Women's Med. Prof'l Corp. v. Voinovich, 911 F. Supp. 1051, 1063 (S.D. Ohio 1995), *aff'd*, 130 F.3d 187 (6th Cir. 1997); James Bopp, Jr. & Curtis R. Cook, *Partial-Birth Abortion: The Final Frontier of Abortion Jurisprudence*, 14 ISSUES IN LAW & MED. 3, 5 n.4 (1998).

[3] Gallup polls show that support for bans rose from fifty-seven percent to seventy percent between 1996 and 2003. Kenneth L. Woodward, *What's In A Name? The New York Times on "Partial-Birth" Abortion*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 427, 433 n.13 (2005). Polls showed that a majority of self-identified pro-choice respondents also favored bans. *Id.*

[4] By 2000, at least thirty states had banned the procedure. *See* Stenberg v. Carhart, 530 U.S. 914, 979 (2000) (Kennedy, J., dissenting). For the history of the Federal Ban, see *infra* note 8.

[5] 410 U.S. 113 (1973).

renthood of Southeastern Pennsylvania v. Casey.[6] The defining moment was the Supreme Court's 2000 decision in *Stenberg v. Carhart* [*Carhart I*],[7] which disallowed Nebraska's ban on partial-birth abortion. *Carhart II*, however, upheld a Federal Ban,[8] thus prohibiting the partial-birth procedure nationwide.[9] Why, then, isn't it time to move on to other issues in the continuing national controversy over abortion?

Some indeed are shifting their emphasis. Advocacy groups have wondered what *Carhart II* portends for other abortion restrictions.[10] Some scholars have pondered its implications for other legal issues.[11] But many still focus upon *Carhart II* itself. While the decision does not lack supporters,[12] its more numerous critics have argued, among other things, (1) that *Carhart II* is inconsistent with *Carhart I*;[13] (2) that the Court granted undue deference to the Congressional Findings of Fact underlying the Federal Ban;[14] and (3) that a particular aspect of the Court's rationale—the "regret" factor[15]—is not only based on faulty evidence,[16] but also is demeaning to women.[17]

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[6] 505 U.S. 833 (1992). *Roe* as modified by *Casey* will hereinafter be referred to as *Roe/Casey*.

[7] 530 U.S. 914 (2000). *Carhart I* will hereinafter be used to refer to the *Stenberg* decision.

[8] Federal partial-birth abortion bans were passed "by wide margins" in 1996 and 1997, but both were vetoed by President Clinton. *Id.* at 994 n.11 (Thomas, J., dissenting). The third Congressional ban, signed by President Bush as the Partial Birth Abortion Ban Act of 2003, passed the House by 281-142, Sheryl Gay Stolberg, *Bill Banning Abortion Procedure Advances*, N.Y. TIMES, Oct. 3, 2003, at A24, and the Senate by 64-34. Sheryl Gay Stolberg, *Senate Approves Bill To Prohibit Type of Abortion*, N.Y. TIMES, Oct. 22, 2003, at A1. The law is codified at 18 U.S.C. § 1531 (Supp. V 2000) (hereinafter referred to as the Federal Ban).

[9] The approved Federal Ban also shows the states how to craft bans to survive constitutional challenge.

[10] *See, e.g.*, Fundraising Letter, Americans United for Life (June 7, 2007) (on file with author) (stating that *Carhart II* "paves the way for states to pass significant new restrictions on abortion").

[11] *See, e.g.*, Randy Beck, Gonzales, Casey, *and the Viability Rule*, 103 NW. U. L. REV. 249 (2009) (arguing that *Carhart II* erodes the significance of viability in abortion jurisprudence); Steven G. Calabresi, *Substantive Due Process After* Gonzales v. Carhart, 106 MICH. L. REV. 1517 (2008) (discussing the decision's impact on substantive due process jurisprudence); David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 641 (2008) (citing the decision as evidence of the increasing significance of severability doctrine to Supreme Court jurisprudence); B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277 (2007) (arguing that the decision is a step toward reconciling pre-existing different approaches to the right to make medical treatment choices).

[12] *See, e.g.*, Barry A. Bostrom, Gonzales v. Carhart, 23 ISSUES L. & MED. 89 (2007); Richard S. Myers, *The Supreme Court and Abortion: The Implications of* Gonzales v. Carhart *(2007), in* LIFE AND LEARNING XVII (2007) (Proceedings of the Seventeenth University for Life Conference).

Beyond this scholarly output, there is additional evidence that *Carhart II* did not completely resolve the issue of partial-birth abortion bans. The Court explicitly contemplated possible as-applied challenges to the Federal Ban.[18] Moreover, federal appellate decisions subsequent to *Carhart II* already reveal disputes about whether state attempts to prohibit the partial-birth procedure are enough like the Federal Ban to survive constitutional challenge.[19]

All of this post-*Carhart II* ferment ignores the most striking aspect of the decision: the Supreme Court committed a fundamental classification error. Despite the procedure's name, partial-birth abortion is not an "abortion" as that term was understood by the *Roe* Court.[20] The Texas statute at issue in *Roe* defined "abortion" as destroying "'the life of the fetus or embyro . . . in the woman's womb.'"[21] *Roe* is replete with language limiting its application to the duration of a pregnancy—a state's regulatory interests become compelling at some "point during pregnancy";[22] a state cannot criminalize abortion "without regard to pregnancy stage";[23] a state can regulate more "as the period of pregnancy lengthens."[24] At "live birth," all such constraints on a state's regulatory freedom disappear, as the fetus then becomes a person "in the whole sense."[25] The Court thus thought of "abortion" only as an act that terminates a pregnancy at some point prior to live birth.[26] Consequently, to kill a fetus during its live birth is not an abortion under *Roe*.[27]

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[13] *See, e.g.*, Michael J. Gerhardt, *Constitutional Humility*, 76 U. CIN. L. REV. 23, 40 n.118 (2007); Martha C. Nussbaum, *Foreward: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 84 (2007) (explaining that *Carhart II*'s reading of *Carhart I* was "bizarrely narrow").

[14] *See, e.g.*, *The Supreme Court, 2006 Term – Leading Cases*, 121 HARV. L. REV. 185, 265-75 (2007).

[15] In arguing that Congress could reasonably determine that the partial-birth procedure "implicates . . . ethical and moral concerns that justify a special prohibition," the Court stated that it was "unexceptional to conclude some women come to regret their choice to abort the infant life they once created and sustained." *Carhart II*, 550 U.S. at 158-59. Any such regret would be "more anguished and sorrow[ful]" when "a mother . . . learns . . . that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child." *Id.* at 159-60.

[16] *See, e.g.*, Nussbaum, *supra* note 13, at 86; Ronald Turner, Gonzales v. Carhart *and the Court's "Women's Regret" Rationale*, 43 WAKE FOREST L. REV. 1 *passim* (2008) (implied throughout rather than explicitly stated). *Contra* Teresa Stanton Collett, *Judicial Modesty and Abortion*, 59 S.C. L. REV. 701, 731-32 (2008).

[17] *See, e.g.*, Nussbaum, *supra* note 13, at 85-87; Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Women-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 837 (2007).

[18] *Carhart II* involved a facial challenge to the Federal Ban. The Court suggested that an as-applied challenge might be successful under appropriate circumstances. *Carhart II*, 550 U.S. at 167-68.

[19] Virginia's partial-birth infanticide ban was initially invalidated, but then upheld on appeal. *See infra* notes 240-44 and accompanying text. Michigan failed in its attempts to prohibit the procedure by creating a protected legal status for partially delivered fetuses. *See infra* notes 245-48 and accompanying text.

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[20] Since the partial-birth abortion procedure had not been devised at the time of *Roe*, *see infra* note 40 and accompanying text, it is apparent that the *Roe* majority did not actually have it in mind when discussing the concept of abortion. The argument here is that the procedure is also not encompassed by *Roe*'s rationale. Consequently, the term, "partial-birth abortion," is a misnomer. The erroneous name in itself has helped defeat the argument that *Roe* is inapplicable to the procedure. One court, for example, referred to the fact that the legislature in question had defined partial-birth abortion as "'*an abortion*'" that encompassed certain specified conduct. Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127, 144 (3d Cir. 2000). Another court emphasized that the ban in question "was intended to be codified under an abortion section—evidencing the state's efforts to restrict abortion access." Causeway Med. Suite v. Foster, 43 F. Supp. 2d 604, 613 (E.D. La. 1999), *aff'd*, 221 F.3d 811 (5th Cir. 2000). This Article will demonstrate that the word "abortion" following "partial-birth" should not be allowed to mask the reality that the procedure kills a child during its birth. *See infra* note 27 and accompanying text.

[21] 410 U.S. 113, 117 n.1 (1973). The Texas "abortion" definition also included causing "'a premature birth,'" *id.*, but the Court never focused on this fact. In any event, the act of causing a premature birth would not be covered by the Federal Ban, which requires an "overt act, other than completion of delivery, that kills the partially delivered living fetus." 18 U.S.C. § 1531(b)(1)(B) (Supp. V 2000).

[22] 410 U.S. at 163.

[23] *Id.* at 164.

[24] *Id.* at 165.

[25] *Id.* at 162.

Partial-birth abortion kills a fetus during its live birth.[28] "'[B]irth' is the 'passage of the offspring from the uterus to the outside world.'"[29] An intended step of the partial-birth procedure is forcibly to begin pulling a fully formed, living, and intact fetus into the outside world.[30] The procedure thus initiates a live birth process.[31] Before the fetus has fully emerged—but when either its head or half its lower body is outside the woman's body[32]—its skull is collapsed.[33] Because the partial-birth proce-

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[26] In *Webster v. Reproductive Health Services*, the plurality opinion characterized *Roe* as establishing "a constitutional framework for judging state regulation of abortion during the entire term of pregnancy." 492 U.S. 490, 520 (1989). The framework sought to balance state interests in protecting the fetus "against the claims of a woman to decide for herself whether or not to abort a fetus she was carrying." *Id.* Once live birth begins, the "term of pregnancy" is essentially over. *Id.* Moreover, the woman is no longer "carrying" the fetus in the conventional sense of that term. *Id.*

[27] *See infra* notes 92-141 and accompanying text. Thus the term, "partial-birth abortion," is an ironic misnomer. The description, "partial-birth," undoubtedly gives ban proponents a rhetorical edge. So much so, that *Newsweek* Contributing Editor Kenneth Woodward argues that the *New York Times*, because of its well-known support of abortion rights, has studiously avoided using what it regards "as a toxic term." Woodward, *supra* note 3, at 436-37, 441-42. But whatever rhetorical advantage opponents of the procedure gain by the phrase, "partial-birth," is offset by the disadvantages of calling the procedure an "abortion." This label no doubt indirectly, and sometimes directly, see *supra* note 20, supports the erroneous perspective that the partial-birth procedure is an abortion properly subject to *Roe*.

[28] The Court in *Carhart II* agrees with this characterization. *See infra* note 91 and accompanying text. "Fetus" is what biologists call an unborn human being beginning at about eight weeks gestational age. LENNART NILSSON & LARS HAMBERGER, A CHILD IS BORN 91 (1990). At this developmental stage, "all the organs are already in place. Everything to be found in a fully grown human being has already been formed." *Id.* Also, "the growing organism, small as it is, looks human even if quite unlike its parents." ROBERTS RUGH & LANDRUM B. SHETTLES, FROM CONCEPTION TO BIRTH: THE DRAMA OF LIFE'S BEGINNINGS 39 (1971). "Fetus" thus is the technical term used for an unborn human baby at or beyond a particular gestational age. I will therefore use the terms "fetus" and "baby"/"child" interchangeably. This usage is supported by *Carhart II*, in which the Court speaks most often of the "fetus," 550 U.S. 124 *passim* (2007), but refers also to "the unborn child," *id.* at 134, 160, "the infant life," *id.* at 159, and "'the baby.'" *Id.* at 138-39. Although using "fetus" and "baby"/"child" synonymously is also consistent with the Latin word, "fetus," which "simply means 'offspring' or 'unborn young,'" David K. DeWolf, *Book Review/Essay*, 26 GONZ. L. REV. 257, 259 n.10 (1991) (quoting AMERICAN HERITAGE DICTIONARY 260 (1983)), some find it objectionable as revealing "hostility to the right *Roe* and *Casey* secured." *Carhart II*, 550 U.S at 186-87 (Ginsburg, J., dissenting).

[29] Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 311 n.14 (2d Cir. 2006) (Straub, J., dissenting) (quoting DORLANDS ILLUSTRATED MEDICAL DICTIONARY 207 (27th ed. 2000)), *vacated*, 224 Fed. Appx. 88 (2d Cir. 2007). *See also* TABER'S CYCLOPEDIC MEDICAL DICTIONARY 251 (20th ed. 2001) ("[t]he act of being born; passage of a child from the uterus").

[30] The steps of the partial-birth procedure were plainly described by Dr. Martin Haskell in a 1992 presentation at a National Abortion Federation meeting. This descrip-

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tion not only played an important role in igniting the partial-birth abortion controversy, see *infra* note 40 and accompanying text, but also has been relied upon in partial-birth abortion decisions as accurately describing the procedure. *See, e.g.*, *Carhart II*, 550 U.S. at 138-39; Carhart v. Ashcroft, 331 F. Supp. 2d 805, 825-27 (D. Neb. 2004), *aff'd*, 413 F.3d 791 (8th Cir. 2005), *rev'd*, *Carhart II*, 550 U.S. 124 (2007). Haskell spoke of grasping a "lower [fetal] extremity" with "a large grasping forcep" and pulling it "into the vagina." Dr. Martin Haskell, *Dilation and Extraction for Late Second Trimester Abortions*, Presented at the National Abortion Federation Risk Management Seminar (Sept. 13, 1992) (hereinafter "Haskell Presentation"). The surgeon then uses "his fingers to deliver the opposite lower extremity, then the torso, the shoulders and the upper extremities." *Id.*

The accompanying textual sentence makes four assertions about the state of the fetus during the partial-birth process: (1) fully formed; (2) living; (3) intact; and (4) partially in the outside world. It is incontestable that fetuses subjected to the partial-birth procedure are fully formed. According to Dr. Haskell, the procedure is used "in patients 20-26 weeks in pregnancy." Haskell Presentation, *supra*. "Even at 20 weeks, doctors say, a developing fetus appears remarkably full-formed, right down to the fingerprints." Roy Rivenburg, *Partial Truths*, L.A. TIMES, Apr. 2, 1997 (Life & Style), at 1. This can be corroborated by consulting any book on fetal development. *See, e.g.*, ALEXANDER TSIARAS, FROM CONCEPTION TO BIRTH: A LIFE UNFOLDS (2002). As to whether the fetus is living, in one sense there is no reason for dispute. If the fetus is not living at the time of the partial-birth procedure, the ban does not apply. The Federal Ban is triggered only if "a living fetus" is delivered to a certain point and then killed by an "overt act, other than the completion of delivery." 18 U.S.C. § 1531(b)(1)(A)-(B) (Supp. V 2000). For a discussion of whether the fetus is in fact "alive" during this process, see *infra* note 34 and accompanying text. Regarding intactness, Dr. Haskell describes a two-day process to dilate the cervix prior to the partial-birth procedure. Haskell Presentation, *supra*. This accomplishes sufficient dilation for the fetus's body to be extracted intact, but usually is inadequate to allow the fetus's skull "to pass through." *Id. See* Rivenburg, *supra* (the doctor "pulls out the body except for the head, which is too large to pass without injuring the woman"). For information on the extent to which the doctor brings the fetus outside the woman's body, see *infra* note 32 and accompanying text.

[31] The Court in *Carhart II* explicitly stated that partial-birth abortion involves "birth"—the procedure's effect is to kill "a fetus . . . just inches before completion of the birth process." 550 U.S. at 157. The Court later found that Congress was reasonable to conclude that the partial-birth procedure "'perverts a process during which life is brought into the world.'" *Id.* at 160.

[32] The Federal Ban only applies if "in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of a breech presentation, any part of the fetal trunk past the navel is outside the body of the mother." 18 U.S.C. § 1531(b)(1)(A) (Supp. V 2000). Breech presentations [feet first] are the most common. Thus, "[i]n the usual . . . [partial-birth procedure,] the fetus' head lodges in the cervix [*see infra* note 207], and dilation is insufficient to allow it to pass." *Carhart II*, 550 U.S. at 138; *see id.* at 150. For evidence that in this situation the required degree of separation from the mother commonly occurs, see *infra* note 208 and accompanying text.

[33] Professor Cynthia Gorney quotes the following as a "fairly accurate [technical] summation" of the partial-birth procedure:

dure kills a fetus during its live birth,[34] it lies outside the constitutional right recognized in *Roe*. Courts have therefore been mistaken to rely upon *Roe* in evaluating legislative bans.

It is important to stress the modesty of the foregoing thesis. I do not argue here that the partially born are constitutional persons under the Fourteenth Amendment.[35] Nor do I argue here that the partially born are a class of humanity otherwise intrinsically entitled to legal protection.[36] My claim is much more limited—*because the partial-birth procedure is not an abortion, a legislative body, unencumbered by Roe/Casey, can appropriately choose to ban it.*

> [T]he abortionist uses forceps to pull a living baby feet-first through the birth canal until the baby's body is exposed, leaving only the head just within the uterus. The abortionist then forces surgical scissors into the base of the baby's skull creating an incision through which he inserts a suction tube to evacuate the brain tissue from the baby's skull. The evacuation of this tissue causes the skull to collapse, allowing the baby's head to be pulled from the birth canal.

Cynthia Gorney, *Gambling With Abortion*, HARPER'S, Nov. 2004, at 34. Gorney does not explain why she finds this description only "fairly" accurate. It certainly comports with Dr. Haskell's explanation of the partial-birth procedure: "[T]he surgeon . . . forces the scissors into the base of the skull . . . [and] spreads [them] to enlarge the opening. The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents." Haskell Presentation, *supra* note 30. Haskell's description, in conjunction with his account of the prior partial delivery of the fetus, *see supra* note 30, makes it clear that the procedure does in fact kill, as Gorney's account portrays and as Congress has found, a "partially-born child." *See* Gorney, *supra*; Congressional Findings 14(H) & (K), in notes following 18 U.S.C. § 1531 (Supp. V 2000).

[34] Early in the partial-birth controversy, some ban opponents argued that anesthesia given to the woman kills the fetus before its skull is collapsed. These included nationally syndicated columnist Ellen Goodman. Ellen Goodman, *Pro-life Lawmakers Aren't Looking at All the Pictures*, ROANOKE TIMES, Nov. 14, 1995, at A7. Kate Michelman, then President of the National Abortion Rights Action League, stated that because anesthesia has already killed the fetus, "it is not true that they're born partially. This is a gross distortion, and it's really a disservice to the public to say this." *Effects of Anesthesia During a Partial-Birth Abortion: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 7 (1996) (transcript of Michelman radio statement). In fact, the early fetal demise argument was the "gross distortion." Anesthesiologists "blasted" it as "scientific bunk." Rivenburg, *supra* note 30 (the article later states that the claim has "been debunked"). *See* Gorney, *supra* note 33, at 41 (characterizing as a "misstep" and "wrong" ban opponents' argument that "the fetus is always dead by the time the doctor begins" the partial-birth procedure).

[35] This argument has appeared from time to time during the partial-birth controversy, *e.g.*, Bopp & Cook, *supra* note 2, at 27-28; *infra* note 60, but evaluating it is beyond the scope of this Article.

[36] Such an argument might be based, for example, on the "created equal" and "inalienable rights" language of the Declaration of Independence. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Part I will show that the "*Roe* is inapplicable" argument appears throughout the fight to ban the partial-birth procedure. The view was communicated to Congress on multiple occasions by prominent legal authorities. It was also asserted numerous times in ban litigation. To overlook this reality is to miss an important aspect of the partial-birth abortion controversy.

Part II will demonstrate that the constitutional right to abortion choice conferred by *Roe* does not encompass partial-birth abortion. *Roe* strongly implied that it does not apply to killing a baby during its birth. The partial-birth process kills a baby while being born.[37] It is therefore wrong to apply *Roe/Casey* to evaluate partial-birth abortion bans. Doing so illegitimately constrains lawmakers' right to prohibit the partial-birth procedure.[38]

Part III will discuss the consequences of recognizing that partial-birth abortion is not an abortion under *Roe*. Most importantly, the partial-birth procedure is not entitled to the same constitutional protection accorded to abortion. Partial-birth abortion bans should therefore be scrutinized under a rational basis standard, not the criteria applicable to abortion legislation. Applying the appropriate constitutional test could very well have dispositive impact if the Federal Ban is ever subjected to an as-applied challenge.[39] Applying the proper standard could also have implications for evaluating state partial-birth abortion legislation in the wake of *Carhart II.*

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[37] *See infra* note 91and accompanying text.

[38] Some courts that have rejected the "*Roe* is inapplicable" argument have explicitly recognized judges' duty not to substitute their own policy choices for those of the legislature—a law should be overturned only if it is clearly unconstitutional. *See, e.g.*, Planned Parenthood of Cent.l N.J. v. Farmer, 220 F.3d 127, 130-31 (3d Cir. 2000); Little Rock Family Planning Servs. v. Jegley, No. LR-C-97-581, 1998 U.S. Dist. LEXIS 22325, at *38 (E.D. Ark. Nov. 13, 1998), *aff'd*, 192 F.3d 794 (8th Cir. 1999). The sincerity of judicial efforts to apply the Constitution correctly in the partial-birth abortion context is not in question. Nonetheless, this Article posits that to the extent that courts have applied *Roe* to evaluate partial-birth abortion bans, they have inappropriately limited the freedom of the people, acting through their elected representatives, to curtail the partial-birth procedure.

[39] *See supra* note 18 and accompanying text.

I. HISTORY

Partial-birth abortion burst into the public consciousness in the early to mid-1990s.[40] Widespread abhorrence quickly led to legislative bans of the procedure.[41] Legal challenges to the bans followed just as swiftly.[42] Critics had three principal arguments for bans' unconstitutionality[43]—vagueness;[44] imposition of an undue burden on a woman's right to obtain a pre-viability abortion;[45] and lack of a health exception.[46] Ban proponents contested these three points, but soon introduced a new argument pertinent to the *Roe/Casey*-based attack. They argued that *Roe/Casey* were inapplicable because the proscribed procedure, although labeled as a type of abortion, actually is outside the *Roe* conception of what an abortion entails. The procedure kills a partially born baby, i.e., one in the process of being born. It therefore actually either is or nearly is infanticide.[47]

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[40] According to the Supreme Court, the procedure "gained public notoriety when, in 1992, Dr. Martin Haskell gave a presentation describing his method of performing the operation." *Carhart II*, 550 U.S. 124, 138 (2007). *See* Rivenburg, *supra* note 30 (the debate arose when "[n]ot long after" Haskell "presented . . . [his] how-to paper[,] . . . a copy . . . found its way to the National Right to Life Committee"). Professor Cynthia Gorney gives 1993 as the start of "intense public argument," the year that "a physician's published description [undoubtedly Dr. Haskell's] . . . was reprinted in right-to-life journals." CYNTHIA GORNEY, ARTICLES OF FAITH: A FRONTLINE HISTORY OF THE ABORTION WARS 522 (1998, 2000).

[41] *See supra* notes 4, 8 and accompanying text. The extent of public opposition to the partial-birth procedure is demonstrated not only by the proliferation of bans, but also by some states' multiple attempts to pass a ban that would survive constitutional scrutiny. One example is Virginia. Its 1998 ban of "partial-birth abortion" was invalidated in *Richmond Medical Ctr. for Women v. Gilmore*, 55 F. Supp. 2d 441 (E.D. Va. 1999), *aff'd*, 224 F.3d 337 (4th Cir. 2000). In 2003, Virginia again tried to ban the procedure by criminalizing "partial birth infanticide." Richmond Med. Ctr. v. Hicks, 301 F. Supp. 2d 499 (E.D. Va. 2004), *aff'd*, 409 F.3d 619 (4th Cir. 2005). This statute was also invalidated. *Id.* The State successfully sought certiorari from the Supreme Court, which, due to *Carhart II*, vacated the Fourth Circuit decision and remanded the case. Herring v. Richmond Med. Ctr. for Women, 550 U.S. 901 (2007). Virginia initially failed in defending its ban, but on appeal was ultimately successful. Richmond Med. Ctr. For Women v. Herring, 527 F.3d 128 (4th Cir. 2008), *rev'd on reh'g*, Richmond Med. Ctr. for Women v. Herring, 570 F.3d 165 (4th Cir. 2009) (en banc). *See infra* notes 240-44 and accompanying text. Michigan's opposition to the partial-birth procedure perhaps surpasses Virginia's. For an account of its dogged efforts to enact a prohibition, including a step requiring the direct involvement of the people of Michigan, see *infra* note 245.

[42] For an early, comprehensive assessment of bans' constitutionality under the *Roe/Casey* standard, see Ann MacLean Massie, *So-Called "Partial-Birth Abortion" Bans: Bad Medicine? Maybe. Bad Law? Definitely!*, 59 U. PITT. L. REV. 301 (1998). Massie mentions the argument that the partial-birth procedure is not an abortion, *id.* at 363, but does not discuss it.

[43] In addition to claims of unconstitutionality, ban opponents tried in other ways to quell the widespread outcry against the partial-birth procedure. Some used factual distortions. The most notable example was revealed when Ron Fitzsimmons, executive director of the National Coalition of Abortion Providers, admitted "that he lied in earlier statements when he said . . . [that the procedure] is rare and performed primarily to save the lives or fertility of women bearing severely malformed babies." David Stout, *An Abortion Rights Advocate Says He Lies About Procedure*, N.Y. TIMES, Feb. 26, 1997, at A11. In fact, "[i]n the vast majority of cases, the procedure is performed on a healthy mother with a healthy fetus." *Id.*

[44] *See, e.g.*, Causeway Med. Suite v. Foster, 43 F. Supp. 2d 604, 615-19 (E.D. La. 1999), *aff'd on other grounds*, 221 F.3d 811 (5th Cir. 2000); Planned Parenthood of

Determining the precise origin of the "*Roe* is inapplicable" perspective is difficult. Although described in a 1999 federal district court opinion as "a unique new argument in abortion

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Greater Iowa, Inc. v. Miller, 30 F. Supp. 2d 1157, 1164-66 (S.D. Iowa 1998), *aff'd on other grounds*, 195 F.3d 386 (8th Cir. 1999); Evans *v.* Kelley, 977 F. Supp. 1283, 1304-11 (E.D. Mich. 1997).

[45] An undue burden "exists if a regulation's 'purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" *Carhart II*, 550 U.S. at 146 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992)). The principal argument that partial-birth abortion bans constitute an undue burden is that they prohibit, in addition to the partial-birth procedure, the more common D&E method of abortion. *See infra* text accompanying notes 152, 197. *See, e.g.*, Eubanks v. Stengel, 28 F. Supp. 2d 1024, 1033-35 (W.D. Ky. 1998), *aff'd*, 224 F.3d 576 (6th Cir. 2000); *Evans*, 977 F. Supp. at 1315-19. The undue burden critique also sometimes is based on the lack of a health exception. *See infra* note 46.

[46] The health exception argument is premised in the requirement that even post-viability abortion regulations must contain a health exception. *See Carhart I*, 530 U.S. at 929-30. Concerning partial-birth abortion bans, the absence of a health exception has sometimes been relied upon as an independent constitutional deficiency, *e.g.*, Causeway Med. Suite v. Foster, 43 F. Supp. 2d 604, 613-14 (E.D. La. 1999), *aff'd*, 221 F.3d 811 (5th Cir. 2000); Planned Parenthood of Greater Iowa, Inc. v. Miller, 30 F. Supp. 2d 1157, 1167-68 (S.D. Iowa 1998), *aff'd*, 195 F.3d 386 (8th Cir. 1999); and sometimes as an element in an undue burden analysis. *E.g.*, Planned Parenthood of Cent. N.J. v. Verniero, 41 F. Supp. 2d 478, 501-03 (D.N.J. 1998), *aff'd sub nom. on other grounds*, Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127 (3d Cir. 2000). The presence of a health exception was a key factor in perhaps the only decision upholding a state partial-birth abortion ban subsequent to *Carhart I*. *See* Women's Med. Prof'l Corp. v. Taft, 353 F.3d 436, 444-50 (6th Cir. 2003). *Carhart II* held that the lack of a health exception in the Federal Ban was constitutionally permissible. 550 U.S. at 161-66.

[47] Between 1996 and 1997, the late pro-choice Senator Patrick Moynihan's opinion of the partial-birth procedure changed from the latter to the former. In 1996, he stated that the procedure was "'as close to infanticide as anything I have come upon in our judiciary.'" Barbara Vobejda & David Brown, *Harsh Details Shift Tenor of Abortion Fight; Both Sides Bend Facts On Late-Term Procedure*, WASH. POST, Sept. 17, 1996, at A01. By 1997, based on Ron Fitzsimmons's confession of how he had lied about the procedure [*see supra* note 43], Moynihan had become convinced that the procedure "is infanticide, and one would be too many." *See Meet the Press* (NBC television broadcast Mar. 3, 1997) (transcript on file with the author).

litigation,"[48] the theory clearly had surfaced by 1998, in court[49] and elsewhere.[50] One advocacy group claims that the "*Roe* is inapplicable" argument originated in its 1997 defense of Arizona's ban.[51] This might well be its first judicial mention,[52] but the theory clearly predates 1997. The approach was asserted at a 1996 House Subcommittee Hearing by Harvard Law Professor Mary Ann Glendon.[53] The earliest mention of the argument I have found is November 1995—by law professors Doug Kmiec[54] and David Smolin[55] at a Senate Judiciary Committee Hearing.[56]

Professor Kmiec came to the view that *Roe* does not cover the partial-birth procedure largely through thinking about the meaning of the word, "abortion."[57] His instincts told him that abortion means the termination of a pregnancy, and a search of numerous medical dictionaries confirmed this initial understanding. Thus, an abortion can occur only during an ongoing pregnancy. But doesn't pregnancy end with the beginning of the birth process? How, then, can the partial-birth procedure be an abortion? To Kmiec, the answer depended on what counts as the beginning of birth. Does it mean only a birth begun in the natural way, by God? Or does it also include a birth begun by man's intervention? He determined that, in this secular age, a man-begun process was also a birth, and thus that *Roe* was inapplicable.

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[48] *Foster*, 43 F. Supp. 2d at 609.

[49] *See, e.g.*, *Verniero*, 41 F. Supp. 2d at 496-98.

[50] Examples include a professional journal article, see Bopp & Cook, *supra* note 2, at 25-27, and a failed Washington State ballot initiative to ban partial-birth infanticide. *See* Jill R. Radloff, Note, *Partial-Birth Infanticide: An Alternative Legal and Medical Route to Banning Partial-Birth Procedures*, 83 MINN. L. REV. 1555, 1556-57 (1999).

[51] *See AFA* [American Family Association] *Law Center defends Arizona ban with novel argument*, AFA JOURNAL, Jan. 1998, at 18.

[52] *See* Planned Parenthood of S. Ariz. v. Woods, 982 F. Supp. 1369, 1377 (D. Ariz. 1997). In addition to this assertion in a lawsuit, the "*Roe* is inapplicable" argument was made several times at a March 1997 Congressional Hearing. *See Partial-Birth Abortion: The Truth: Joint Hearing Before the S. Comm. on the Judiciary and the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 53, 108 (1997) [hereinafter *March 1997 Hearing*] (Prepared Statement and testimony, respectively, of Douglas Johnson, representing the National Right to Life Committee); *id.* at 72 (testimony of Helen Alvare, representing The Catholic Bishops' Conference); *id.* at 161 (Letter from Prof. Douglas Kmiec to Sen. Orin G. Hatch & Rep. Henry J. Hyde (Mar. 10, 1997)). The argument was also submitted as part of Congressional floor debate on partial-birth abortion. *See infra* note 75 and accompanying text.

[53] *Origins and Scope of Roe v. Wade: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 47 (1996) [hereinafter *April 1996 Hearing*] (Prepared Statement of Professor Mary Ann Glendon). The "*Roe* is inapplicable" argument was also suggested by Helen Alvare, representing the National Conference of Catholic Bishops, on a television broadcast. *60 Minutes: Partial-Birth Abortion* (CBS television broadcast June 2, 1996) (the procedure "is not truly abortion as the Supreme Court addressed that issue in Roe v. Wade").

[54] *The Partial-Birth Abortion Ban Act of 1995: Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 170, 174, 186, 194, 198 (1995) [hereinafter *November 1995 Hearing*] (testimony of Prof. Douglas Kmiec); *id.* at 231 (Letter from Prof. Douglas Kmiec to Sens. Orrin G. Hatch & Patrick Leahy (Nov. 27, 1995)).

[55] *Id.* at 345-46 (Written Testimony of Prof. David Smolin).

[56] As was true for Professor Mary Ann Glendon, *see supra* note 53 and accompanying text, other law professors eventually accepted this new argument. *See infra* note 75 and accompanying text.

Professor Smolin's submission to the November 1995 Hearing is especially interesting because of his interaction with Congress a few months earlier. In June 1995, at the first Congressional Hearing on a proposed federal ban, he submitted a written statement, thus perhaps becoming the first law professor formally to communicate to Congress on the subject.[58] Smolin stated that "[t]he proposed prohibition of this particular method of abortion constitutes, in constitutional terms, a regulation of abortion."[59] Five months later, however, he argued that killing a partially extracted infant "has never been held [to be] within the constitutional right or liberty to abort. . . . Thus, the entire constitutional regime created by *Roe* . . . and . . . *Casey* is . . . irrelevant to the constitutional analysis of a ban on partial-birth abortions."[60]

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[57] Telephone Interview with Doug Kmiec, Professor of Law, Pepperdine University School of Law (Aug. 5, 2008) (also the source for the other statements in the text accompanying this footnote). Professor Kmiec was also influenced by the fact that *Roe* explicitly failed to address a Texas statute that criminalized killing a baby in the process of being born. *Id.*; *see infra* notes 103-05 and accompanying text.

[58] Professor Smolin was scheduled to testify in person, but time constraints made that impossible. *Partial-Birth Abortion: Hearing Before the Subcomm. on the Constitution of the H. Judiciary Comm.*, 104th Cong. 97-102 (1995) [hereinafter *June 1995 Hearing*].

[59] *Id.* at 98.

[60] *November 1995 Hearing*, *supra* note 54, at 345. Although Smolin has no specific recollection of why his views changed during this five-month period, Telephone Interview with David Smolin, Professor of Law, Cumberland Law School, Samford University (Aug. 5, 2008), the two statements themselves show how his thinking evolved. In June, Smolin argued that although *Roe* held that the "unborn" are not constitutional persons, a partially born infant might nonetheless have that protected status. *June 1995 Hear-*

Regardless of its exact origin, the "*Roe* is inapplicable" theory has persisted in the battle over partial-birth abortion bans. Since 1999, the argument has on occasion appeared in legislative documents,[61] but has surfaced most often in judicial proceedings. Numerous federal district and circuit court opinions discuss the theory,[62] and it has been advanced in numerous briefs filed with various courts.[63] Although the approach has in part convinced at least one individual judge,[64] courts have

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ing, *supra* note 58, at 100. He relied in part upon the fact that Texas's parturition statute, which criminalized killing a baby while being born, was not challenged in *Roe*. *Id.*; *see infra* notes 103-105 and accompanying text. Smolin did not emphasize the significance of this assertion—his discussion of constitutional personhood appears as an interlude in the middle of an argument that a partial-birth abortion ban can survive scrutiny under a *Roe/Casey* analysis. *June 1995 Hearing*, *supra* note 58, at 100. By November, Smolin had revised his written statement to highlight the constitutional personhood argument. It now came first, as a separate subsection. *November 1995 Hearing*, *supra* note 54, at 344-45. Smolin's second argument, missing from his June statement, but again relying on the fact that *Roe* "did not rule on the constitutionality of the Texas statute prohibiting the destruction of an unborn child during childbirth," was that the partial-birth procedure does not "trigger[] the abortion liberty." *Id.* at 345. Thus, even if fetuses are not constitutional persons, a partial-birth abortion ban must only satisfy "the rational basis test." *Id.*

[61] *See, e.g.*, *Partial-Birth Abortion Ban Act of 2002, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 107th Cong. 164-65 (2002) (Written Testimony of Douglas Johnson).

[62] Many partial-birth abortion ban decisions do not mention the theory. *E.g.*, Planned Parenthood v. Miller, 30 F. Supp. 2d 1157 (S.D. Iowa 1998), *aff'd*, 195 F.3d 386 (8th Cir. 1999); Eubanks v. Stengel, 28 F. Supp. 2d 1024 (W.D. Ky. 1998), *aff'd*, 224 F.3d 576 (6th Cir. 2000). Such decisions also have a significant role in any account of the "*Roe* is inapplicable" perspective—as examples of the flaw currently undermining partial-birth abortion jurisprudence.

[63] *See, e.g.*, *infra* note 90 and accompanying text.

[64] Judge Chester Straub "do[es] not believe that a woman's right to terminate her pregnancy under *Roe* . . . extends to the destruction of a child that is substantially outside of her body." Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 298 (2d Cir. 2006) (Straub, J., dissenting), *vacated*, 224 Fed. Appx. 88 (2d Cir. 2007). *See id.* at 312. While this acknowledgment would seem to compel the conclusion that *Roe* is inapplicable to the partial-birth procedure, Judge Straub would still apply *Roe*, but in a way that would uphold the Federal Ban. *See id.* at 310-13. A 2003 House Judiciary Committee Report makes the same mistake. The Report first states that "partial-birth abortion should not implicate . . . [the abortion] right because the pregnancy ended once the birth process began and the right to terminate one's pregnancy by aborting one's unborn child does not include an independent right to assure the death of that child regardless of its location to the mother." H.R. REP. NO. 108-58, at 21-22 (2003). But rather than arguing that *Roe* is thus inapplicable to the partial-birth procedure, the Report says only that "the government [therefore] has a heightened interest in protecting the life of the partially-born child." *Id.* at 22.

unanimously rejected it.[65] Some have done so by totally ignoring the argument,[66] but others have openly scoffed. Courts have characterized the theory as: unsupported by precedent;[67] "a conceptual theory that . . . has no relationship to fact, law or medicine";[68] a "back door effort to limit . . . [the abortion] right";[69] ideological;[70] and "specious."[71] Third Circuit Judge Maryanne Barry had an extraordinarily negative reaction to the argument. In a span of two pages, she characterized it as (1) "based on semantic machinations, irrational line-drawing, and an obvious attempt to inflame public opinion instead of [on] logic or medical evidence";[72] (2) "a desperate attempt to circumvent over twenty-five years of abortion jurisprudence";[73] and (3) "an effort to cloud the issues."[74]

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[65] An interesting case study is the history of the "*Roe* is inapplicable" argument in Virginia. The State in 1998 had tried unsuccessfully to ban "partial-birth abortion." In the ensuing litigation, the State asserted what the district judge called "the rather unusual view that *Roe* . . . [is] inapplicable because . . . the Supreme Court did not announce constitutional protections to abortions where 'the child is partially born.'" Richmond Med. Ctr. for Women v. Gilmore, 11 F. Supp. 2d 795, 822 (E.D. Va. 1998). The court "decline[d] the State's invitation to circumvent the requirements of *Roe,*" *id.*, a rejection it reiterated in a later phase of the case. Richmond Med. Ctr. for Women v. Gilmore, 55 F. Supp. 2d 441, 480 (E.D. Va. 1999), *aff'd*, 224 F.3d 337 (4th Cir. 2000) (per curiam). In 2003, Virginia tried again to ban the partial-birth procedure, this time making its policy rationale clearer by now seeking to ban "partial birth infanticide." A different federal district judge invalidated the new statute, once more rejecting Virginia's attempt "to establish a line [demarking a State's ability to prohibit abortion] in 'terms of whether a fetus was in the process of being born.'" Richmond Med. Ctr. for Women v. Hicks, 301 F. Supp. 2d 499, 515 (E.D. Va. 2004). The Fourth Circuit affirmed, without explicitly referring to the State's argument that *Roe* is inapplicable to the partial birth procedure. *See* Richmond Med. Ctr. for Women v. Hicks, 409 F.3d 619 (4th Cir. 2005), *vacated & remanded*, 550 U.S. 901 (2007), *aff'd sub nom.* Richmond Med. Ctr. for Women v. Herring, 527 F.3d 128 (4th Cir. 2008), *rev'd*, 570 F.3d 165 (4th Cir. 2009). The Fourth Circuit ultimately upheld the Virginia ban based upon *Roe/Casey* as applied in *Carhart II*, with no reference to the "*Roe* is inapplicable" argument. *See* Richmond Med. Ctr. for Women v. Herring, 570 F.3d 165 (4th Cir. 2009).

[66] A prime example is the Supreme Court in both *Carhart I* and *Carhart II*. *See infra* notes 89-90 and accompanying text.

[67] Planned Parenthood of S. Ariz., Inc. v. Woods, 982 F. Supp. 1369, 1377 (D. Ariz. 1997).

[68] Causeway Med. Suite v. Foster, 43 F. Supp. 2d 604, 615 (E.D. La. 1999), *aff'd*, 221 F.3d 811 (5th Cir. 2000).

[69] *Id.* at 619.

[70] Northland Family Planning Clinic v. Cox, 487 F.3d 323, 346 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 873 (2008). In affirming the district court's denial of permissive intervention to Standing Together To Oppose Partial-Birth-Abortion (STTOP), the court characterized STTOP's brief as taking "an ideological approach to the litigation rather than attempting to argue for the . . . [challenged law's] validity under relevant Supreme Court precedent." *Id.* And what was STTOP's principal argument? That *Roe* does "not address the legal status of . . . transitional person[s]," i.e., human beings in the process of being born. *See* Final Reply Brief of Proposed Intervenor/Appellant, 2006 WL 3223977, at 14.

[71] R.I. Med. Soc'y v. Whitehouse, 66 F. Supp. 2d 288, 304 (D.R.I. 1999), *aff'd*, 239 F.3d 104 (1st Cir. 2001).

This host of derogatory comments suggests that the "*Roe* is inapplicable" argument is frivolous, if not deliberately obfuscating. In fact, courts have been far too dismissive. Part II will demonstrate that sixty-three law professors were correct in stating to Congress that "[t]he destruction of human beings who are partially born is . . . entirely outside the legal framework established in Roe v. Wade and Planned Parenthood v. Casey."[75] Courts that have rejected the "*Roe* is inapplicable" argument have inappropriately limited the people's power to express their corporate repudiation of the partial-birth procedure.

II. MISAPPLYING *ROE*

In evaluating whether *Roe/Casey* protect partial-birth abortion, an initial response might be to decry the very idea of constitutional protection for killing a baby during its birth[76] via what one federal judge has called "a gruesome, brutal, barbaric, and uncivilized medical procedure."[77] This protest would be understandable, but misguided. Judge John Noonan has reminded us that the long-protected life of American slavery shows that moral depravity does not necessarily mean the absence of constitutional status.[78] The proper legal question is whether *Roe*, properly interpreted, encompasses the partial-birth procedure within the constitutional right to an abortion.[79]

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[72] Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127, 143 (3d Cir. 2000).

[73] *Id.* at 144.

[74] *Id.* Judge Barry also brands as "mischaracterization" a standard, authenticated description of the partial-birth procedure. *See id.* at 140. It thus is ironic that she herself fails to grasp what the procedure actually involves. *See infra* notes 206-09 and accompanying text.

[75] Letter from sixty-three Law Professors to Sen. Orrin Hatch (May 8, 1997), *in* 143 CONG. REC. 8807 (1997).

[76] This characterization of partial-birth abortion is not only justified by what the process in fact entails, see *supra* notes 28-34 and accompanying text and *infra* notes 142-86 and accompanying text, but also has been accepted by the Court in *Carhart II*. *See infra* note 91 and accompanying text. For an eloquent denunciation of the idea of constitutional protection for the partial-birth procedure, see Richmond Med. Ctr. for Women v. Herring, 570 F.3d 165, 180-83 (4th Cir. 2009) (Wilkinson, J., concurring).

[77] Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 479 (S.D.N.Y. 2004), *aff'd sub nom.* Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278 (2d Cir. 2006), *vacated*, 224 Fed. Appx. 88 (2d Cir. 2007). Cynthia Gorney writes that "[a] tone of queasy resignation permeates parts of [the district judge's] ruling [invalidating the Federal Ban], as though the judge were still reeling from descriptions of things that appear to be constitutionally protected despite being gruesome and brutal and so forth." Gorney, *supra* note 33, at 45.

The theoretical concept that *Roe* has only a limited reach presumably is not controversial. For example, no one would argue that the decision protects a woman's right to kill any of her children under the age of two. Another example of *Roe*'s limited scope is provided by Born-Alive Infants Protection Acts. These Acts, at both the federal[80] and state[81] level, are a legislative response to live-birth abortions.[82] Some abortion procedures result in infants born alive.[83] Abortionists nonetheless have either directly killed these newborn infants or left them unattended to die.[84] Born-Alive Infants Protection Acts confer legal personhood status on such babies.[85] This legislation is unaffected by *Roe/Casey*.[86]

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[78] *See* John T. Noonan, Jr., *The Root and Branch of* Roe v. Wade, 63 NEB. L. REV. 668, 668-69 (1984). Slavery was not explicitly mentioned in the Constitution, but its "legitimate presence" in American society was implicitly acknowledged by the "three-fifths clause," the "slave-trade clause," and the "fugitive-slave clause." *See* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 26-27 (1978).

[79] *Roe* itself, of course, is highly controversial, but the question of its correctness, i.e., whether the Constitution, properly interpreted, confers a constitutional right to an abortion, is beyond the scope of this Article.

[80] *See infra* note 85.

[81] Making accurate generalizations about state laws protecting infants born alive following an attempted abortion is complicated. Some such laws are officially named "Born-Alive Infant Protection Acts" and were enacted in the early 2000s more or less contemporaneously with the similarly named Federal Act. *See, e.g.*, 5 ILL. COMP. STAT. ANN. 70/1-36 (Supp. 2008) (modeled after the Federal Act); MICH. COMP. LAWS ANN. § 333.1071.73 (2008) (not modeled after the Federal Act). Some states, however, protected born-alive infants long before the recent flurry of legislation. Pennsylvania, for example, as part of its 1974 Abortion Control Act, punished as second degree murder one who, "with intent to do so, . . . intentionally and wilfully take[s] the life of a premature infant aborted alive." 35 PA. STAT. ANN. § 6604 (1977). In 1978, this statute was repealed with the entire 1974 Act, but was replaced in 1982 by a provision in Pennsylvania's new Abortion Control Act entitled "Infanticide":

> The law of this Commonwealth shall not be construed to imply that any human being born alive in the course of or as a result of an abortion or pregnancy termination, no matter what may be that human being's chance of survival, is not a person under the Constitution and laws of this Commonwealth.

18 PA. STAT. ANN. § 3212(a) (2000). For other examples of this early protection for born-alive infants, see MONT. CODE ANN. § 50-20-108(1) (2007) (entitled "Protection of premature infants born alive"); and NEB. REV. STAT. § 28-331 (1995) (entitled "Care and treatment of child aborted").

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[82] The legislation, at least to federal lawmakers, was considered essential "'to establish . . . a limit to . . . [the] sweeping 'right' to abortion'" recognized in *Carhart I. See* Roger Bryon, *Children of a Lesser Law: The Failure of the Born-Alive Infants Protection Act and a Plan for Its Redemption*, 19 REGENT U. L. REV. 275, 278 (2006-07). The Federal Act was also motivated by the decision in *Planned Parenthood of Central New Jersey v. Farmer*, 220 F.3d 127 (3d Cir. 2000), which alarmed lawmakers by stressing a woman's intent in defining "the scope of her right to destroy her offspring." Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 311 n.14 (2d Cir. 2006) (Straub, J., dissenting), *vacated*, 224 Fed. Appx. 88 (2d Cir. 2007). *See infra* note 183.

[83] Liz Jeffries & Rick Edmonds, *The Dreaded Complication*, PHIL. INQUIRER (Aug. 2, 1981) (Special Reprint Edition). At the time, the Center for Disease Control estimated "400 to 500 abortion live births" each year in the United States. *Id.* The incidence of live births, of course, depends chiefly on the abortion technique used. A D&E abortion [see *infra* note 152 and accompanying text] is "foolproof," i.e:, it "never, ever results in live births." *Id.* Prostaglandin instillation, on the other hand, can produce a live birth rate as high as eight percent. Nancy K. Rhoden, *The New Neonatal Dilemma: Live Births From Late Abortions*, 72 GEO. L.J. 1451, 1458 (1984). Live births following abortions are a continuing phenomenon. *See* Shantala Vadeyar, Tracey A. Johnston, Mary Sidebotham & Jean Sands, *Neonatal death following termination of pregnancy*, 112 BJOG 1159 (Aug. 2005) (a study of neonatal death following abortion in thirty-one cases over six years in a certain medical region in England).

[84] Jeffries & Edmonds, *supra* note 83. *See* Bryon, *supra* note 82, at 275-76 (giving real-life examples of born infants "killed or left to die" following abortion attempts). There sometimes is an attempt to provide medical care to fetuses born alive after an attempted abortion. *See* MAGDA DENES, IN NECESSITY AND SORROW: LIFE AND DEATH IN AN ABORTION HOSPITAL 39 (1976).

[85] For example, the Federal Born-Alive Infants Protection Act defines "'person,' 'human being,' child,' and 'individual'" as including "every infant member of the species homo sapiens who is born alive at any stage of development." 1 U.S.C. § 8(a) (2006). "'[B]orn alive'" includes (but is not limited to) an infant who, following "complete expulsion or extraction" from its mother, "breathes or has a beating heart . . . regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion." *Id.* at § 8(b). Bryon, *supra* note 82, argues that the Federal Act in fact confers very little, if any, actual protection on such infants.

[86] Although the declaration obviously does not bind a court, Michigan's Born Alive Infant Protection Act states: "A woman's right to terminate pregnancy ends when the pregnancy is terminated. It is not an infringement on a woman's right to terminate her pregnancy for the state to assert its interest in protecting a newborn whose live birth occurs as the result of an abortion." MICH. COMP. LAWS ANN. § 333.1072(c) (2008). While I have not found a judicial ruling on the constitutionality of Born-Alive Infant Protection Acts, there is substantial legal authority that *Roe* is inapplicable once live birth occurs. The decision most on point is *Showery v. State*, 690 S.W.2d 689 (Tex. Ct. App. 1985), which upheld a murder conviction for a doctor who suffocated a fetus after it was re-

The "*Roe* is inapplicable" argument follows naturally from *Roe*'s acknowledged inapplicability to babies born alive. In the partial-birth procedure, the baby is killed before it is completely separated from the woman, but during a birth process—either the baby's entire head or its trunk from above the navel is entirely outside the woman.[87] At this stage of partial separation, when the baby clearly is alive, its skull is collapsed.[88] As will now be demonstrated, *Roe* cannot properly be read to protect the right to kill a baby in this manner.

A. Roe *By Its Own Terms Does Not Apply Once the Birth Process Begins*

In view of *Carhart I* and *Carhart II*, it would seem the height of presumption to argue that *Roe* does not apply to the partial-birth procedure. The argument was explicitly discussed in the lower court decisions leading to *Carhart I*.[89] The theory

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moved alive from its mother's body following an abortion attempt. The court held that *Roe* was irrelevant because "[s]eparation from the mother is a rite of passage beyond the shadow of conflict with her fundamental rights." *Id.* at 693-94. *Nealis v. Baird*, 996 P.2d 438 (Okla. 1999) (upholding a wrongful death action for a nonviable fetus born alive), reached a similar conclusion: "Nothing in *Roe prohibits* the states from affording legal protection to fetuses that are born alive." *Id.* at 454-55. Moreover, Judge Richard Posner has stated that "[o]nce the baby emerges from the mother's body, no possible concern for the mother's life or health justifies killing the baby." Hope Clinic v. Ryan, 195 F.3d 857, 882 (7th Cir. 1999) (Posner, J., dissenting) (involving partial-birth abortion bans), *rev'd*, 249 F.3d 603 (7th Cir. 2001). *See infra* text accompanying note 221. Finally, the history of Pennsylvania's statutory protection for born-alive infants strongly supports the view that *Roe* is inapplicable to such legislation. Both the 1974 and 1982 statutes were part of comprehensive abortion legislation, each entitled "Abortion Control Act." *See supra* note 81. When both of these Acts were challenged as unconstitutional, the born-alive infant protection provisions were not attacked individually, but only as part of the claim that the Acts as a whole were unconstitutional. When the courts in both cases denied these comprehensive claims, Act opponents did not even argue that the born-alive protective provisions were individually invalid. *See* Am. Coll. Obstet. & Gynecol., Pa. Section v. Thornburgh, 552 F. Supp. 791 (E.D. Pa. 1982) (challenging the 1982 Act), *aff'd*, 476747 (1986); Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa. 1975) (challenging the 1974 Act), *aff'd sub nom.* Franklin v. Fitzpatrick, 428 U.S. 901 (1976) (plaintiffs' appeal), *aff'd sub nom.* Colautti v. Franklin, 439 U.S. 379 (1979) (defendants' appeal). Thus, even those eager to challenge abortion restrictions acknowledged *Roe*'s inapplicability to measures protecting humans born alive.

[87] *See supra* note 32 and accompanying text.

[88] *See supra* note 33 and accompanying text.

[89] In the initial phase of the lawsuit, the State argued that *Roe* did not recognize "'a constitutional right to kill a *partially born human being*.'" Carhart v. Stenberg, 972 F. Supp. 507, 529 (D. Neb. 1997) (abortionist's request for preliminary injunction). The

was also articulated in briefs submitted to the Court in both cases.[90] Nonetheless, the Court in both decisions totally ignored the "*Roe* is inapplicable" argument and applied *Roe/Casey* to evaluate partial-birth abortion bans. While the Court's complete disregard of the theory admittedly seems to be its deathblow, this would be an unduly negative assessment. *Carhart II* acknowledges that the partial-birth procedure kills a baby during its birth.[91] All that remains is for the Court to recognize that *Roe* did not extend constitutional protection to a process that kills a baby after its birth has begun.

The *Roe* Court held that the constitutional right of privacy encompasses "the abortion decision,"[92] i.e., "a woman's decision whether or not to terminate her pregnancy."[93] There plainly is

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court interpreted this argument as an "invitation to ignore *Roe*" and declined to accept it because there was "no precedent . . . [that] uses the 'partially born human being' category as a construct for constitutional analysis." *Id.* The court declined that invitation for a "second time" in ruling favorably on the abortionist's request for a permanent injunction. Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1132 n.48 (D. Neb. 1998). The Eighth Circuit expressed no final opinion on whether "there is a separate legal category for the 'partially born.'" Carhart v. Stenberg, 192 F.3d 1142, 1151 (8th Cir. 1999). Even if there were, the category would not be relevant to the present litigation because the court believed "that the word 'born' refers most naturally to a viable fetus." *Id.* This Article demonstrates the deficiencies in this argument. *See infra* notes 159-72 and accompanying text.

[90] For *Carhart I*, see *Brief of Amici Curiae Louisiana and Mississippi in Support of Petitioners*, 2000 WL 228483, at 2-11. For *Carhart II*, see, *e.g.*, *Brief of Amici Curiae the American Center for Law and Justice, 78 Members of Congress, and the Committee to Protect the Ban on Partial-Birth Abortion in Support of Petitioner*, 2006 WL 1436694, at 9-11.

[91] This conclusion follows undeniably from several statements in the opinion. The fetus is extracted from the womb by methods "conducive to pulling out its entire body, instead of ripping it apart." Gonzales v. Carhart, 550 U.S. 124, at 137 (2007). Doctors thus extract "the fetus intact or largely intact." *Id.* This extraction method is a "delivery" in that it "'assist[s] a woman in childbirth.'" *Id.* at 152 (quoting STEDMAN'S MEDICAL DICTIONARY 470 (27th ed. 2000)). It thus is properly characterized as a "birth process." *Id.* at 157; *see id.* at 160. The fetus, regardless of viability, "is a living organism while within the womb," *id.* at 147—an "unborn child," *id.* at 160; *see id.* at 134, and an "infant life." *Id.* at 159. The doctor then kills the fetus after either its head or "'trunk past the navel is outside the body of the mother.'" *Id.* at 147-48 (quoting 18 U.S.C. § 1531(b)(1)(A) (Supp. IV 2004)). Taken together, these statements acknowledge that the partial-birth procedure kills a baby during its birth. *See id.* at 138-39 (the Court relating a nurse's description of how a doctor stuck "'scissors in the back of . . . [a "'baby's'"] head'") (quoting H.R. REP. NO. 108-58, at 3 (2003)). For a defense of the Court's characterization, see *supra* notes 28-34 and accompanying text and *infra* notes 142-186 and accompanying text.

[92] Roe v. Wade, 410 U.S. 113, 154 (1973).

[93] *Id.* at 153. *See supra* notes 20-27 and accompanying text.

no constitutional right to abort once birth occurs. First, once the fetus is born, it enjoys the protection accorded by the Fourteenth Amendment to the life of every "person."[94] Second, while the Court stated that it would "not resolve the difficult question of when life begins," it was responding to the assertion that "life "begins at conception and is present throughout pregnancy."[95] The Court therefore was only expressing its unwillingness to "speculate" as to when life begins *during a pregnancy*.[96] The Court elsewhere stated its belief that at "live birth" both human life[97] and personhood "in the whole sense"[98] unquestionably are present.[99]

But what exactly does "live birth" mean? In particular, what is the status of a fetus in the process of being born? *Roe* is not entirely clear on this point, but it contains important indicators. First, in speaking of both constitutional and ontological personhood, the Court stated that these categories do not include "the unborn."[100] As James Bopp and Dr. Curtis Cook have argued, "[a] baby who is partially delivered cannot properly be termed *unborn*."[101] In the partial-birth procedure, either the fetus's head or the lower half of its body is outside the woman,[102] i.e., born. Second, the Court quotes, but does not comment upon, a Texas parturition statute, not challenged in the *Roe* litigation, that criminalized killing "'a child in a state of being born and before actual birth.'"[103] Professor Richard Stith argues that this bare reference shows that the Court "explicitly left undecided" the issue of whether the "momentous shift from sub-human to human life [occurs] at the beginning, in the middle, or at the end of the birth process."[104] Since, however, the Court denies personhood only to "the unborn," one can reasonably read its silence about this Texas statute as suggesting "that abortion jurisprudence does not govern state regulation of procedures during extraction of the child."[105] This conclusion is further supported by an exchange that occurred during the oral arguments in *Roe*:

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[94] *See* 410 U.S. at 157-58.

[95] *Id.* at 159.

[96] *See id.* But as argued by Judge Michael McConnell, the result in *Roe*, withdrawing legal protection for fetal life, shows that the Court in fact decided the question. Samuel W. Calhoun & Andrea E. Sexton, *Is It Possible to Take Both Fetal Life and Women Seriously? Professor Laurence Tribe and His Reviewers*, 49 WASH. & LEE L. REV. 437, 453 n.79 (1992).

[97] 410 U.S. at 150, 161.

[98] *Id.* at 161-62.

[99] *See supra* notes 80-86 and accompanying text (discussing Born-Alive Infant Protection Acts).

[100] 410 U.S. at 158, 162.

[101] Bopp & Cook, *supra* note 2, at 26. Justice Scalia argues that the partial-birth procedure involves "killing a human child—one cannot even accurately say an entirely unborn human child." *Carhart I*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting).

[102] *See supra* note 32 and accompanying text; *see also infra* notes 206-08 and accompanying text.

[103] 410 U.S. at 118 n.1.

> Mr. Justice Marshall: What does it [the parturition statute] mean?
>
> Mr. Flowers:[106] I would think that --
>
> Justice Stewart: That it is an offense to kill a child in the process of childbirth?
>
> Mr. Flowers: Yes, sir. It would be immediately before childbirth, or right in the proximity of the child being born.
>
> Justice Marshall: **Which is not an abortion.**

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[104] Richard Stith, *Location and Life: How* Stenberg v. Carhart *Undercut* Roe v. Wade, 9 WM. & MARY J. WOMEN & L. 255, 266-67 (2003). Yet Professor Stith himself still argues that to disregard the beginning of the birth process is to act inconsistently with *Roe*'s premise that "[l]ocation—in or out of the womb—. . . determined whether actual human life existed and whether it was constitutionally protected." *Id.* at 255; *see id.* at 266-67.

[105] Bopp & Cook, *supra* note 2, at 26-27. The United States Court of Appeals for the Third Circuit gave two reasons for rejecting this argument based on the Texas statute. First, "[t]he fact that the Supreme Court did not *sua sponte* review a provision no party asked it to review says nothing about its position on that provision or on [the argument that *Roe* is inapplicable to partial-birth abortions]." Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127, 144 (3d Cir. 2000). This is a good point, but the court ignores the important exchange in oral argument concerning the statute. *See infra* notes 106-07 and accompanying text. Second, the court considered any arguments based upon the statute as inapplicable to partial-birth abortion because the statute, "[b]y its own terms . . . applies explicitly to killing the fetus . . . during the process of giving birth, not during an abortion procedure." *Farmer*, 220 F.3d at 144. It will be shown that the partial-birth procedure is an instance of "giving birth." *See infra* notes 142-86 and accompanying text.

[106] Robert C. Flowers was an Assistant Attorney General of Texas. *Roe*, 410 U.S. at 115.

> Mr. Flowers: Which is not--would not be an abortion, yes sir. You're correct, sir. It would be homicide.[107]

Based on this dialogue, it is reasonable to conclude that Justice Marshall, who voted with the majority in *Roe*, did not intend to recognize a constitutional right that would bar states from prohibiting killing a child once delivery has begun.[108] Justice Stewart, also in the *Roe* majority, did not question Justice Marshall's characterization. One can therefore reasonably surmise that he agreed with Justice Marshall's understanding that the right to abortion ends when the birth process begins.

It is noteworthy that *Roe*'s inapplicability to the partial-birth procedure was asserted by numerous law professors during the legislative process leading to the Federal Ban.[109] Those law professors who believed a ban to be unconstitutional had mixed responses. Harvard Professor Laurence Tribe, while never commenting directly on the "*Roe* is inapplicable" theory, demonstrated that he failed to grasp its underlying anatomical facts. Tribe asserts that a ban is irrational because it "defies plausible justification in terms of anything real."[110] How so? Because the ban draws a distinction based,

> strangely, on the physical location of the fetus between the uterus and the vagina . . . as though the fetus that is being aborted were suddenly to acquire . . . traits of

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[107] Transcript of Oral Reargument, Roe v. Wade, 410 U.S. 113 (1972) (No. 70-18) (emphasis added), *available at http://www.oyez.org/cases/1970-1979/1971/1971_70_18/reargument* (last visited Jan. 25, 2010)) My thanks to my former student, Mark Trapp, for bringing this enlightening colloquy to my attention. *See* Mark M. Trapp, *Blackmun's Bane*, ENTER STAGE RIGHT, Jan. 27, 2003, *available at* http://www.enterstageright.com/archive/articles/0103/0103abortion.htm (last visited Jan. 25, 2010).

[108] I am aware of the grounds for criticizing placing undue emphasis on this exchange concerning a statute that was not under review in *Roe*. *See infra* note 129 and accompanying text.

[109] As mentioned, sixty-three professors endorsed the theory in a 1997 letter to Congress, submitted in conjunction with congressional debate on the proposed ban. *See supra* note 75 and accompanying text. In addition, *Roe*'s limited scope was asserted by several different law professors on multiple occasions during congressional hearings on the ban. *See supra* notes 53-55, 60 and accompanying text.

[110] *March 1997 Hearing*, *supra* note 52, at 137 (prepared statement of Prof. Laurence H. Tribe).

> personhood, simply by virtue of having been moved from one point to another *within the woman's body* prior to completion of the abortion procedure.[111]

Tribe unaccountably overlooks the crucial fact of the fetus's partial emergence *into the outside world*.[112]

In 1996, Georgetown Professor Mark Tushnet was asked directly whether the partial birth procedure, "in which a child is partially delivered before being killed and the delivery is completed[,] is within the scope of the protections afforded by *Roe v. Wade*[.]"[113] Tushnet testified that his "intuition" led him to conclude that *Roe* applied because the Court "drew the line at birth," and it would be difficult to draw it any earlier.[114] This is a particularly interesting response given that Tushnet was Justice Marshall's law clerk when *Roe* was reargued and decided. As already shown, the Justice himself had no difficulty in drawing a line earlier than birth—to him, the word "abortion" did not encompass killing a child during the process of childbirth.[115]

Professor Louis Seidman, another Marshall clerk at the time of *Roe*, would seemingly agree with the distinction drawn by Justice Marshall. Seidman, although arguing in 1995 for a ban's unconstitutionality, came close to admitting the validity of the "*Roe* is inapplicable" theory. Professor Seidman's testimony was preceded by that of Professor Douglas Kmiec, who defended the theory.[116] After Senator Fred Thompson repeatedly pressed for Professor Seidman's response to the distinction Kmiec drew between abortions—covered by *Roe/Casey*—and the partial-birth scenario that he asserted fell outside those decisions,[117] Seidman said, "I suppose if Congress wants to pass a law that prohibits stabbing a scissors into the head of a baby where everything is out of the birth canal but a portion of the head, that would be something we could consider."[118]

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[111] *Id.* (emphasis added).

[112] *See supra* note 32 and accompanying text. Tribe is not the only one to make this mistake. *See infra* notes 206-08 and accompanying text (emphasizing Judge Richard Posner's error).

[113] *April 1996 Hearing*, *supra* note 53, at 123 (question from Rep. Canady, Member, House Comm. on the Judiciary).

[114] *Id.*

[115] *See supra* notes 106-07 and accompanying text.

[116] *November 1995 Hearing*, *supra* note 54, at 170, 174, 194, 198.

[117] *See id.* at 199-200.

Judge Richard Posner would allow even more extensive protection for the baby. In explaining his constitutional objection to Wisconsin's partial-birth abortion ban, Posner stated:

> We . . . do not doubt that if in the course of a normal labor the mother asked her obstetrician to kill the baby in the birth canal and he did so, the state could criminalize this act as infanticide. But here . . . the state has criminalized merely a procedure, and acknowledged the right to abort by an alternative procedure the same fetus whose death by partial birth abortion would subject the doctor to punishment as a murderer. So there is no issue of infanticide, of killing a live baby that is half-born.[119]

Posner thus flatly proclaims that a state can criminalize killing a baby still wholly within the birth canal,[120] i.e., none of it is outside the mother.[121] His necessary presupposition is that *Roe* does not extend constitutional protection to such an act.

My principal thesis thus far has been threefold: (1) that the abortion right recognized in *Roe* is delimited by the onset of birth; (2) that the partial-birth procedure entails the beginning of birth; and (3) thus that *Roe* does not constrain legislative bans. It might be argued, however, that my syllogism has a glaring weakness—"birth" as used in *Roe* most probably connoted a full-term delivery. Thus, when Justice Marshall indicated that killing a child during childbirth "is not an abortion," he likely had in mind a full-term fetus emerging from the womb in a routine delivery. Judge Posner obviously had such a fetus in mind when he referred to a state's ability to criminalize killing a “baby in the birth canal” during “a normal labor.”[122] Consequently, even if one accepts the proposition that *Roe* has a limited scope, the limitation is not nearly broad enough to encompass the typical partial-birth abortion, which occurs far earlier than full-term.[123]

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[118] *Id.* at 200.

[119] Planned Parenthood of Wis. v. Doyle, 162 F.3d 463, 471 (7th Cir. 1998) (citation omitted).

[120] Professor Laurence Tribe presumably would agree: "Nearly everyone, surely, would think it profoundly wrong if 'people with power' chose to treat an admittedly 'unborn' infant, struggling to push itself through the birth canal during the final minutes of its mother's labor, as not yet a person morally entitled to our protection and love." LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 120 (1990).

[121] Posner speaks of a killing within the birth canal, whereas Seidman refers to killing a baby mostly outside the mother. *See supra* text accompanying note 118. It will be shown that Posner's grasp of the anatomy of the partial-birth procedure is erroneous. *See infra* notes 206-09 and accompanying text.

The foregoing argument can be readily overcome by focusing once more on Justice Marshall's suggestion, via his comment on the Texas parturition statute, that *Roe* does not apply to killing a child during childbirth.[124] The Texas statute criminalized killing “'a child in a state of being born and before actual birth, which child would otherwise have been born alive.'“[125] The critical phrase is “would otherwise have been born alive.” Does it connote a full-term delivery? The clear answer is “no.” At the time of Justice Marshall's comment,[126] the only proof Texas required was that, “but for the act of the accused,”[127] the child would have been able to breathe following complete separation from its mother.[128] The common occurrence of premature births plainly shows that breathing ability precedes full-term development. Consequently, Justice Marshall, in indicating that the act prohibited by the Texas parturition statute was not an "abortion," did not contemplate a "full-term baby" constraint on *Roe*'s inapplicability to the birth process.

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[122] *See supra* text accompanying note 119.

[123] *See infra* note 134 and accompanying text.

[124] *See supra* text accompanying notes 106-07.

[125] Roe v. Wade, 410 U.S. 113, 118 n.1 (1973).

[126] Marshall made his observation on October 11, 1972. *See supra* note 107.

[127] Hardin v. State, 106 S.W. 352, 353 (Tex. Crim. App. 1907).

[128] This understanding of “born alive” is extrapolated from Texas homicide law. A successful homicide prosecution required proof that the victim was living after complete expulsion from the mother's body. *See* Wallace v. State, 10 Tex. Ct. App. 255, 270 (1881). Showing “aliveness” in turn required a showing that the baby breathed following its complete separation. *See id.* at 271-74. If this test was met, the child was deemed to be “born alive.” Thereafter, “'however frail it may be, and however near extinction from any cause,'“ a person who intentionally killed it would be guilty of homicide. *See id.* at 275-76. The parturition statute, which covers killings “before actual birth,” obviously eliminates any separation requirement. Instead, the question is whether the child, had it not been killed during its birth, would have been able to breathe following its complete separation. The homicide standard of “'however frail'“ shows that in 1972 the parturition statute did not require proof that the baby would have been viable, see *infra* note 131, had it not been killed prior to complete separation, despite what at least one court has stated. R.I. Med. Soc'y v. Whitehouse, 66 F. Supp. 2d 288, 304 (D.R.I. 1999), *aff'd*, 239 F.3d 104 (1st Cir. 2001). This conclusion is bolstered by the fact that Texas, a few years after the oral argument in *Roe*, enacted a definition of “born alive” that plainly excludes a viability requirement: a child is deemed to be born alive, “irrespective of the duration of pregnancy,” as long as it breathes or shows other stipulated “evidence of life” after its “complete expulsion or extraction” from its mother.” TEX. FAM. CODE ANN. §12. 05(b) (Vernon 1979) (now codified at TEX. FAM. CODE ANN. § 151.002(b) (Vernon 2001)).

But isn't it unconvincing to rely so heavily on the specifics of the Texas parturition statute in evaluating Marshall's statement? The statute was not at issue in *Roe*,[129] and one therefore cannot fairly assume that Marshall's brief comment was made in full awareness of its particulars. In addition, there is an indication that the Texas courts themselves believe that *Roe* impacted the constitutionality of the Texas statute. In *Showery v. Texas*,[130] the court stated that "[a] prosecution under [the] statute might necessitate an analysis in terms of viability under *Roe*."[131] This statement does not support the "full-term baby" constraint on *Roe*'s inapplicability to the birth process, but it does suggest that there might be a viability constraint.[132] In fact, *Roe*'s emphasis on viability is a principal reason that many courts have rejected the "*Roe* is inapplicable" approach. A representative assertion is that "Roe . . . categorized fetuses as viable or not viable. No case with which we are familiar uses the 'partially born human being' category as a construct for constitutional analysis."[133]

If there is a viability limitation on *Roe*'s inapplicability to the birth process, the argument that *Roe* does not apply to partial-birth abortion bans is largely defeated, for the partial-birth procedure is mainly used for pre-viable fetuses.[134] *Roe* itself, however, refutes a viability constraint. As already noted, the Court denied personhood only to the "unborn," a word that can reasonably be read to exclude any partially delivered baby, regardless of stage of development.[135] Moreover, to impose a viability constraint is to misperceive the role of viability in *Roe*'s analytical framework. Viability marks the point *during a pregnancy* at which the state interest in potential life becomes compelling, therefore justifying prohibition of abortion.[136] But the beginning of the birth process means that the pregnancy is essentially over.[137] The "potential life" is now manifest as the baby emerges alive from the woman's body. To acknowledge this reality in no way conflicts with the Court's unwillingness to speculate about when life begins in an ongoing pregnancy.[138] Viability is thus not a prerequisite for the power to legislate constitutionally about the birth process.

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[129] *See supra* note 105.

[130] 690 S.W.2d 689 (Tex. Crim. App. 1985).

[131] *Id.* at 692. A fetus is viable when it is "potentially able to live outside the mother's womb, albeit with artificial aid." Roe v. Wade, 410 U.S. 113, 160 (1973).

[132] The court's statement is far from definitive: *Roe* "*might*" be pertinent. Moreover, the *Showery* court's statement was dictum, as the case did not involve a prosecution under the parturition statute.

[133] Carhart v. Stenberg, 972 F. Supp. 507, 529 (D. Neb. 1997). *See, e.g.*, R.I. Med. Soc'y v. Whitehouse, 66 F. Supp. 2d 288, 304 (D.R.I. 1999), *aff'd*, 239 F.3d 104 (1st Cir. 2001); Planned Parenthood of Cent. N.J. v. Verniero, 41 F. Supp. 2d 478, 497 (D.N.J. 1998), *aff'd sub nom.* Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127 (3d Cir. 2000).

[134] *See* Woodward, *supra* note 3, at 439 (discussing an investigative report by David Brown of the *Washington Post*).

There is a final argument that *Roe* did not intend to encompass non-viable, partially born children within the abortion right. As noted, Judge Posner assumes that a state can constitutionally prohibit as infanticide the killing of a baby during "normal labor."[139] But he argues that partial-birth abortion bans are unconstitutional because they do not constitute "killing a live baby that is half-born."[140] Posner's characterization of the partial-birth procedure can be evaluated empirically. If the procedure does in fact kill "a live baby that is half-born"—a test that does not mention viability—Posner's logic compels the conclusion that partial-birth abortion bans, just like the infanticide laws he endorses, are not subject to *Roe*. The Supreme Court in *Carhart II* acknowledges that the partial-birth procedure does kill a baby during its birth.[141] The next section will demonstrate that the Court is correct. *Roe* therefore does not constrain partial-birth abortion bans.

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[135] *See supra* notes 100-01 and accompanying text.

[136] *See Roe*, 410 U.S. at 162-63. However, *Roe* prevents the states from according meaningful protection even to viable fetuses. *See infra* notes 219, 227 and accompanying text.

[137] At one point, the *Roe* Court refers to viability as an "interim point" preceding "live birth." 410 U.S. at 160. This does not mean that "live birth" can only occur after viability. The Court no doubt was referring to a pregnancy of normal length, in which viability does precede birth. To say that live birth can never precede viability would be to contradict medical reality. *See infra* notes 159-72 and accompanying text.

[138] *See supra* notes 95-96 and accompanying text.

[139] *See supra* notes 119-21 and accompanying text.

[140] *See supra* text accompanying note 119.

B. Partial-Birth Abortion Kills a Baby During Its Birth

Does the reference to "birth" in "partial-birth abortion" ring true? Ban opponents have strenuously said "no," branding the term as disingenuous,[142] propagandistic,[143] and "inflammatory."[144] Professor Cynthia Gorney has written that "[t]here is no textbook reference to any . . . medical state called 'partial birth.'"[145] Even if one assumes she is correct—which is doubtful today given the prominence of the partial-birth abortion controversy—this would not mean there is no actual physical state of being partially born. To my knowledge, there is no word that means "a person in the process of going through a door from the inside of a house to the outdoors." This does not mean there are no people who are partially outdoors as they emerge from doorways.

The simplest way to resolve this dispute over use of the term, "birth," is to ask if the phrase "partial birth" describes what actually happens in the partial-birth abortion procedure. It does. As pointed out by Justice Clarence Thomas, "the fetus is all but born when the physician causes its death."[146] The fetus dies while being born, i.e., being removed from the woman's body.[147] Its life is terminated when it "has already emerged partly into what we would call in layperson's terms the outside world."[148] Hence, it was partially born at the time of its death.[149]

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[141] *See supra* note 91 and accompanying text.

[142] Alisa Solomon, *Fetal Distraction: In the Fight over Abortion, Women's Rights Seem to Have Disappeared*, THE VILLAGE VOICE, Jan. 27, 1998, at 49.

[143] *See 60 Minutes: Partial-Birth Abortion*, *supra* note 53 (comment of Dr. Warren Hern).

[144] *In Depth: Late-Term Abortions* (America's Talking television broadcast June 22, 1995) (comment of Vicki Saporta, Executive Director, National Abortion Federation) (on file with author).

[145] Gorney, *supra* note 33, at 33.

[146] *Carhart I*, 530 U.S. 914, 986 n.5 (2000) (Thomas, J., dissenting). Thomas's "all but born" characterization is clearly correct, given that either the fetus's head or over half its lower body is outside the woman's body before it is killed. *See supra* note 32 and accompanying text.

[147] *See supra* note 29 and accompanying text.

As noted, Judge Richard Posner asserts that the partial-birth procedure does not involve "killing a live baby that is half-born."[150] His explanation, however, is curious at best—that a state cannot constitutionally prohibit killing the same fetus "by an alternative procedure."[151] Posner here is referring to the fact that partial-birth abortion bans do not apply to standard D&E abortions, in which a fetus is dismembered and removed from the uterus in pieces,[152] rather than being extracted intact, as in the partial-birth procedure. But does Posner's point matter at all in evaluating what actually occurs during the partial-birth procedure? The fetus either is or is not alive and half-born when killed. The fact that it could be killed in some other way is irrelevant.[153]

But there are other possible objections to characterizing the partial-birth procedure as involving an actual partial birth.[154] Admittedly, the initial picture the word "birth" suggests is a full-term, natural birth.[155] That said, few, presumably, would conclude that "partial-birth" is an inapt description because the procedure takes place far earlier than at full-term[156] and depends upon artificial means. Deliveries prior to full-term are habitually called premature births;[157] and deliveries that are induced, assisted by forceps, or occur via Caesarian section all constitute births.[158] But there are two more serious arguments: the partial-birth procedure is not a partial "birth" because (1) it involves a fetus who likely is pre-viable; and (2) it aims for a dead, not a live, baby. Neither of these characteristics negates a partial "birth."

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[148] *November 1995 Hearing*, *supra* note 54, at 150 (statement of Helen Alvare). And "partly" means far more than minimally. *See supra* note 146.

[149] "'Partial-birth' as a label emphasizes the fact the delivery of a fetus/baby takes place, but only up to a point . . . ." Woodward, *supra* note 3, at 433.

[150] *See supra* text accompanying note 119.

[151] *See supra* text accompanying note 119.

[152] *See Carhart II*, 550 U.S. 124, 135-37 (2007).

[153] Despite the weakness of Posner's argument, one court characterizes it as adequately addressing the concern that striking a partial-birth abortion ban "will condone infanticide." *See* Planned Parenthood of Cent. N.J. v. Verniero, 41 F. Supp. 2d 478, 498 (D.N.J. 1998), *aff'd sub nom.* Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127 (3d Cir. 2000). For an extended discussion of the rationality of banning the partial-birth procedure, despite the inability to prohibit standard D&Es, see *infra* notes 193-233 and accompanying text.

[154] For the argument that the Federal Born-Alive Infants Protection Act precludes the concept of "partial birth," see *infra* note 163.

[155] In fact, some have criticized the term "partial-birth" for the very reason that "birth" most naturally connotes a full-term baby. *See* Bopp & Cook, *supra* note 2, at 22. Some ban opponents have further alleged that ban advocates deliberately cultivated the misimpression that the partial-birth procedure normally involves near-term fetuses, *see March 1997 Hearing*, *supra* note 52, at 86-90 (statements of Kate Michelman), a charge denied by ban proponents. *See id.* at 87-88 (statements of Helen Alvare and Douglas Johnson). There undeniably were some instances when ban advocates gave incorrect information. *See* Vobejda & Brown, *supra* note 47 (relating Newt Gingrich's assertion that the procedure is used to abort "'child[ren] in the eighth or ninth month'"). In fact,

1. Viability Is Not a Prerequisite for Partial Birth

The United States Court of Appeals for the Eighth Circuit, in addressing the "*Roe* is inapplicable" argument, believed there was no need to determine whether there is a "legal category" for the "'partially born,'" to which "the rule of *Roe* . . . does not apply."[159] This step was unnecessary because the record was insufficient to prove that fetuses subject to the partial-birth procedure were partially born—"the word 'born' refers most naturally to a viable fetus, one that is capable of surviving outside the

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the procedure is mainly used for fetuses of "less than 24 weeks gestation." *Id.* It should be noted, however, that Dr. Martin Haskell stated that he knew of a surgeon who used it "up to 32 weeks or more." Haskell Presentation, *supra* note 30.

[156] *See supra* note 134 and accompanying text.

[157] James Bopp and Curtis Cook are thus correct in saying that "*full-term*" and "*birth* . . . are two completely different things, both legally and in common parlance." Bopp & Cook, *supra* note 2, at 22. While premature births are not uncommon, "birth" has also been used to describe some quite unusual deliveries prior to full-term. The CBS Evening News of June 6, 2008 contained an intriguing segment entitled "Born Twice." It was the story of Macee McCartney, who had prenatal surgery at twenty-five weeks. To perform the procedure, the doctors temporarily pulled the uterus from her mother's body and then pulled half of Macee's body outside the uterus. The CBS correspondent spoke of Macee's "two birth dates," i.e., the day of her surgery—"the first time she was born"—and her delivery day ten weeks later. *Evening News* (CBS television broadcast June 6, 2008) (transcript on file with the author). Katie Couric referred to the "baby born not once, but twice." *Id.*

[158] Macee's example, *supra* note 157, also shows that "birth" includes non-standard removal from the mother. It is interesting that CBS used "birth," not partial birth, to describe Macee's half-delivered state.

[159] Carhart v. Stenberg, 192 F.3d 1142, 1151 (8th Cir. 1999), *aff'd*, 530 U.S. 914 (2000).

mother," whereas the case seemed "to be exclusively about non-viable fetuses."[160]

Assuming that "born" does "most naturally" refer to a viable fetus,[161] does non-viability mean there can be no partial birth? In answering this question, it is instructive first to consider viability's pertinence to full-birth status. The National Right to Life Committee's Douglas Johnson gives this view:

> The fetus's *location* is what matters . . . if it's all the way out of the woman's body and it's alive, it's been born, no matter how developed it is . . . . "Let's say you have a baby born at twenty-two and three-quarters weeks," . . . [and] "[y]ou have two neonatologists standing over the incubator, arguing about whether they should do this or that, whether it's futile, whether this baby has a chance. Suddenly somebody rushes in from the corridor and strikes the baby on the head with a hammer. Does anybody dispute that a homicide just occurred? No. One neonatologist may say a certain intervention is futile here. Another may say, 'No, we should do this or that thing.' But they're both going to grab that guy and call the cops."[162]

Johnson's argument rings true. Viability is clearly irrelevant to birth status for fetuses killed after complete separation from the woman. This is now a legal reality under federal law, even if the separation occurred during an abortion procedure. Under the Federal Born-Alive Infants Protection Act, fully separated infants can fit the definition of "born alive,"[163] regardless of their stage of development.[164] Viability has also been found to be irrelevant in other contexts. Some states issue birth certificates for babies born alive regardless of viability.[165] Most states allow actions for nonfatal prenatal injuries regardless of when during pregnancy they were inflicted.[166] Viability is also not a requirement for wrongful death actions brought in connection with babies who died after being born alive.[167] Criminal convictions have also been upheld for causing the death of a live-born baby, regardless of viability[168]

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[160] *Id. See* R.I. Med. Soc'y v. Whitehouse, 66 F. Supp. 2d 288, 304 (D.R.I. 1999) (suggesting that non-viability in itself precludes a birth process), *aff'd*, 239 F.3d 104 (1st Cir. 2001). This Article's earlier discussion of viability evaluated and rejected the argument that *Roe*'s implied inapplicability to the birth process encompassed only viable fetuses. *See supra* notes 130-38 and accompanying text. The present discussion of viability evaluates the empirical question of whether the concept of "partial birth" includes only viable fetuses.

[161] *See supra* text accompanying note 155.

[162] Gorney, *supra* note 33, at 44. In this hypothetical, the baby's gestational age when born suggests its possible viability. It is unclear whether Johnson would state the same outcome if the baby were clearly non-viable. Regardless, other legal developments demonstrate that lack of viability should be irrelevant to a fully separated baby's entitlement to legal protection. *See infra* notes 163-68 and accompanying text.

[163] *See supra* note 85. One court has used this complete separation requirement to suggest that partially separated infants cannot be "born alive." *See* Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 288 (2d Cir. 2006), *vacated*, 224 F. App'x 88 (2d Cir. 2007). The court's argument reflects a complete misreading of the statute. The Federal Act

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includes only fully separated infants within its statutory definition of "born alive," but also says that it shall not "be construed to . . . deny . . . or contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being 'born alive.'" 1 U.S.C. § 8(c) (2006). The law thus "affirms the existence and dignity of postnatal life without denying the same of prenatal life." Stith, *supra* note 104, at 275. *See* Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 312 (2d Cir. 2006) (Straub, J., dissenting), *vacated*, 224 F. App'x. 88 (2d Cir. 2007).

[164] *See supra* note 85. Viability is also irrelevant under most State Born-Alive Infant Protection Acts. *See, e.g.*, 5 ILL. COMP. STAT. 70/1.36 (Supp. 2008); MICH. COMP. LAWS § 333.1071(2)(b) (2008). Some states require viability, *e.g.*, MONT. CODE ANN. § 50-20-108(1) (2007) (the statute is not named a "Born-Alive Infant Protection Act," but instead is entitled "Protection of premature infants born alive"), but this is a minority view. *See* H.R. REP. NO. 107-186, at 7, 13 (2001) (stating that thirty States follow a definition of "live birth" that does not contain a viability prerequisite and applies in a failed abortion context).

[165] *E.g.*, FLA. STAT. §§ 382.002(10), 382.013 (2007); 410 ILL. COMP. STAT. 535/1(5), 535/12(1) (2005). The authors of a 2005 British study, which examined the incidence of completely expelled or extracted living fetuses following abortion attempts, presumably would question this practice. The study documents eighteen examples of pre-viable fetuses that met the criteria of "live birth" according to the World Health Organization definition. Vadeyar et. al., *supra* note 83, at 1159-60. The authors said, "it is clear that there is significant underreporting." *Id.* at 1161. The law required that "all live births and neonatal deaths must be registered." *Id.* at 1159-60. Nonetheless, the authors questioned "what purpose it serves to register as a live birth a fetus that is clearly not capable of being born alive and surviving . . . because the gestational age is below the clinical limit of viability. This . . . misleadingly increases the perinatal mortality rate." *Id.* at 1161. It is difficult to imagine a more striking example of an effort to mask the reality of live birth.

[166] Paul Benjamin Linton, Planned Parenthood v. Casey: *The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 47-49 (1993).

[167] Nealis v. Baird, 996 P.2d 438, 455 (Okla. 1999) ("*Reason dictates that a child, once born alive, must be recognized as a person regardless of its ability to sustain life for any particular period of time thereafter.*"); Hudak v. Georgy, 634 A.2d 600, 603 (Pa. 1993) ("[T]oday we are reaffirming the unremarkable proposition that an infant born alive is, without qualification, a person."). The *Hudak* court states that "no jurisdiction . . . [requires] that a child must be viable at the time of [live] birth in order to maintain an action in wrongful death." *Id.* at 602.

[168] *See* Showery v. State, 690 S.W.2d 689 (Tex. App. 1985) (upholding the murder conviction of a doctor who suffocated a fetus after it was removed alive from its mother's

Stage of development should also be irrelevant to partial-birth status for partially delivered fetuses. Non-viability does not mean that a partially extracted fetus has not been partially born. The key inquiry is not viability, but whether the fetus is alive.[169] The Supreme Court in *Carhart II* stated that viability is irrelevant to whether a fetus is alive within the womb: "[B]y common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb."[170] Viability is also irrelevant to whether fetuses are alive when doctors begin to drag them from the womb during the partial-birth process. As previously shown, the

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body following an abortion attempt). *But cf.* People v. Chavez, 176 P.2d 92, 94-95 (Cal. Dist. Ct. App. 1947) (stating that a showing of viability is required, but, in finding the evidence sufficient to prove that the "child was born alive and became a human being," only mentions "that the baby was born alive and that it breathed and had heart action"). In the non-abortion context, there is also increasing legal recognition of the irrelevance of viability. The Federal Unborn Victims of Violence Act (Laci and Conner's Law) "provides that if a child in utero is injured or killed during the commission of certain federal crimes of violence against its mother, then the assailant has committed an offense against two victims: the mother *and* the unborn child." Luke M. Milligan, *A Theory of Stability: John Rawls, Fetal Homicide, and Substantive Due Process*, 87 B.U. L. REV. 1177, 1183 (2007) (describing 18 U.S.C. § 1841 (Supp. V 2005)). The Act applies regardless of the unborn child's stage of development. *Id.* at 1183 n.19. Thirty-six states have also "incorporated the double-victim approach into their penal codes[,]" *id.* at 1184, and twenty-four of these "provide that unborn children become legally separate entities upon their conception." *Id.* at 1185 & n.25.

[169] Because the Federal Ban applies even to non-viable fetuses, one court severely criticized Congress for its "misleading and inaccurate language" suggesting that the partial-birth procedure kills a baby during its birth. Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 1029-30 (N.D. Cal. 2004), *aff'd sub nom.* Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163 (9th Cir. 2006), *rev'd*, Gonzales v. Carhart II, 550 U.S. 124 (2007). To the court, "a 'live' fetus is not the same as a 'viable' fetus." *Id.* at 1030. No one can dispute this point. But it is also indisputable that a non-viable fetus can still be alive. "While a fetus typically is not viable until at least 24 weeks lmp [last menstrual period], it can be 'living' . . . as early as seven weeks lmp, well before the end of even the first trimester." Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163, 1183-84 (9th Cir. 2006), *rev'd*, Gonzales v. Carhart II, 550 U.S. 124 (2007). Why then is it inaccurate to refer to a living, non-viable fetus, largely outside the woman's body, as partially born?

[170] *Carhart II*, 550 U.S. at 147. In upholding South Dakota's informed consent-to-abortion statute, the Eighth Circuit endorsed the "truthfulness" of a required disclosure describing the fetus as "'a whole, separate, unique, living human being,'" with "'human being'" defined as "'an individual living member of the species of Homo sapiens.'" Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 735-36 (8th Cir. 2008). As stated by Professor Randy Beck, "[n]o one can reasonably doubt that a developing fetus constitutes a living biological organism distinct from its mother long before the point of viability." Beck, *supra* note 11, at 274.

evidence plainly establishes that these fetuses are living up until the time their skulls are collapsed.[171] Since they are “all but” outside the woman when this occurs,[172] they are in fact partially born. To say otherwise is to deny physical reality.

2. Intent to Kill Does Not Negate Partial Birth

The United States Court of Appeals for the Third Circuit, in rejecting the argument that *Roe* is inapplicable to partial-birth abortion bans because a fetus “is in the process of being 'born' at the time of its demise,” stated that “[a] woman seeking an abortion is plainly not seeking to give birth.”[173] The court saw no need to conduct an independent evaluation as to whether the partial-birth procedure initiates a birth process. In fact, even to suggest that a partial birth occurs was to engage in “semantic machinations, irrational line-drawing, and an obvious attempt to inflame public opinion.”[174] The woman's intent to kill indelibly marked the procedure as an abortion.

The court in *Causeway Medical Suite v. Foster*,[175] in refusing to view the partial-birth procedure as an actual partial birth, also stressed the woman's intent—”to terminate her pregnancy”[176]—but in addition relied upon the physician's objective in initiating the alleged “'process of birth.'“[177] “'[B]irth'“ is induced “artificially” in order to complete a “particular abortion procedure.”[178] This marks the procedure as an abortion, not “the killing of a child during delivery.”[179]

To say that intent to kill precludes characterizing the partial-birth procedure as killing a partially born child is to say that “[t]here [are] no objective facts” about birth and the entity being killed.[180] Once the “fateful choice” to abort is made, “there

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[171] *See supra* notes 33-34 and accompanying text.

[172] *See supra* note 146 and accompanying text.

[173] Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127, 143 (3d Cir. 2000).

[174] *See id.*

[175] 43 F. Supp. 2d 604 (E.D. La. 1999), *aff'd*, 221 F.3d 811 (5th Cir. 2000).

[176] *Id.* at 612.

[177] *Id.* at 618.

[178] *Id.*

[179] *See id.*

[180] HADLEY ARKES, NATURAL RIGHTS AND THE RIGHT TO CHOOSE 276 (2002). Professor Arkes does not refer explicitly to the doctor's intent to kill. He focuses on Judge

[is] no child to be killed, no birth to take place."[181] But intent to kill does not alter what has actually occurred in the real world—the partial emergence of a living baby from the woman's body. This physical reality should override anyone's intent.

Lawmakers have already embraced this principle in the different context of Born-Alive Infant Protection Acts. These laws, previously discussed, recognize that birth has in fact occurred when a fetus is completely separated from the woman, even when the separation results from induced abortion.[182] The Acts thus subordinate the woman and doctor's common intent to kill to undeniable physical reality—the existence of a born, living baby.[183]

Barry's opinion in the *Farmer* decision, which spoke only of the woman's intent. *See supra* notes 173-74 and accompanying text. Arkes thinks that "[i]f there was ever a decision that embodied the very vices it was decrying, this must surely have been it." ARKES, *supra*. Why? Because Judge Barry eschews "objective facts" in favor of "perceptions, . . . 'semantics' and 'line-drawing.'" *Id.*

[181] ARKES, *supra* note 180, at 276.

[182] *See, e.g.*, *supra* notes 81, 85, 164.

[183] The Federal Born-Alive Infants Protection Act was in part motivated by the "logical implications" of the *Farmer* decision [*supra* notes 173-74 and accompanying text], i.e.,

> once a child is marked for abortion, it is wholly irrelevant whether that child emerges from the womb as a live baby. That child may still be treated as though he or she did not exist, and would not have any rights under the law . . . . [T]here would, then, be no basis upon which the government may prohibit an abortionist from *completely* delivering an infant before killing it or allowing it to die. The 'right to abortion,' under this logic, means nothing less than the right to a dead baby, no matter where the killing takes place.

H.R. REP. NO. 107-186, at 2 (2001). Some might criticize this perspective on *Farmer* as an alarmist interpretation of what the opinion actually said. Admittedly, there is nothing in Judge Barry's discussion of the significance of intention explicitly indicating that she would give the mother's intention to kill dispositive weight in assessing the legal status of a fully separated child. Still, this possible expansion of intention's impact has troubled others besides the House Committee. *See* Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 311 n.14 (2d Cir. 2006) (Straub, J., dissenting) ("If the intent of the mother controls the scope of her right to destroy her offspring, there is no reason why she should not be able to destroy the child after it has completely been separated from her body."), *vacated*, 224 F. App'x 88 (2d Cir. 2007); ARKES, *supra* note 180, at 276. At least one abortionist has clearly indicated that he feels obligated to kill a fully separated living fetus "because 'my ultimate job on any given patient is to terminate that pregnancy, which means that I don't want a live birth.'" Richmond Med. Ctr. for Women v. Herring, 527 F.3d 128, 152 (4th Cir. 2008) (Niemeyer, J., dissenting). Born-Alive Infant Protection Acts eliminate any uncertainty by according legal protection to living, fully separated babies, regardless of anyone's original intention to kill.

Intention to kill also does not change the physical reality of a partially born baby. As noted, Judge Posner believes that a state could criminally punish a doctor who, *at the request of the mother*, kills a baby in the birth canal.[184] The mother and doctor's intent to kill is no obstacle. Posner denies the partially born state of a baby killed during the partial-birth procedure,[185] but his rationale has been shown to be unpersuasive.[186] No one's intention to destroy should be allowed to mask the actual existence of these partially born babies.

This Part has shown that partial-birth abortion is not entitled to the *Roe/Casey* level of constitutional protection. Given that the procedure brutally kills a baby during its birth,[187] diminishing partial-birth abortion's constitutional status in itself would be a worthwhile accomplishment,[188] even if no practical consequences followed. But Part III will demonstrate that "demoting" partial-birth abortion in fact could have a significant impact.

III. CONSEQUENCES OF DIMINISHING PARTIAL-BIRTH ABORTION'S CONSTITUTIONAL STATUS

If partial-birth abortion does not qualify for protection under *Roe/Casey*, are there any constraints on majority will with respect to the procedure? This Part demonstrates that any legislation is still subject to "rational basis" review and that partial-birth abortion bans readily satisfy this standard. The Part then comments on some of the implications of using the correct evaluative standard in both the federal and state contexts.

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[184] *See supra* text accompanying note 119.

[185] *See supra* text accompanying note 119.

[186] *See supra* notes 151-153 and accompanying text.

[187] *See supra* note 91 and accompanying text.

[188] As previously stated, moral repulsiveness alone does not mean lack of constitutional protection. *See supra* notes 76-78 and accompanying text. But a morally repellant practice should receive only the protection that is clearly mandated. Partial-birth abortion is not encompassed by the abortion right recognized in *Roe/Casey*.

A. Evaluating Partial-Birth Abortion Bans Under the Rational Basis Standard

The normal standard for evaluating legislative enactments is the rational basis test. *Williamson v. Lee Optical*,[189] a Supreme Court decision in the business realm, contains a classic explanation of this standard: "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[190] But the test applies beyond a commercial setting. In *Washington v. Glucksberg*,[191] which upheld Washington's assisted-suicide ban, the Court stated that to survive constitutional scrutiny a law must only be "rationally related to legitimate governmental interests."[192]

Do partial-birth abortion bans satisfy the rational basis standard? Are they reasonably related to furthering legitimate governmental interests? Justice Clarence Thomas has written that there is a clear governmental interest in "prohibiting a procedure that approaches infanticide, and thereby dehumanizes the fetus and trivializes human life."[193] This quote reveals a legitimate governmental interest—promoting the value of human life—and a step rationally related to its promotion—banning an act "that approaches infanticide."[194] But does this phrase accurately describe the partial-birth procedure? Here is what one nurse observed:

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[189] 348 U.S. 483 (1955).

[190] *Id.* at 488. *See also* Ferguson v. Skrupa, 372 U.S. 726, 730 n.7 (1963) (quoting Sproles v. Binford, 286 U.S. 374, 388-89 (1932) ("'When the subject lies within the police power of the state, debatable questions as to reasonableness are not for the courts but for the Legislature, which is entitled to form its own judgment . . . .'")).

[191] 521 U.S. 702 (1997).

[192] *Id.* at 728. This was the proper test because the Court had first determined that assisted suicide is not a fundamental right. *Id.* Part II of this Article has established that the same is true of partial-birth abortion.

[193] *Carhart I*, 530 U.S. 915, 1006 (2000) (Thomas, J., dissenting).

[194] *Id.* In prohibiting an act "that approaches infanticide," Congress intervened to curtail any movement down a slippery slope toward actual infanticide. *See Carhart II*, 550 U.S. 124, 158 (2007). The Court in *Glucksberg*, in concluding that Washington's assisted suicide ban was "rationally related to legitimate government interests," 521 U.S. at 728, relied in part on the state's "fear that permitting assisted suicide [would] start it down the path to voluntary and perhaps even involuntary euthanasia." *Id.* at 732. In addition, Congress could reasonably "think that partial-birth abortion . . . 'undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world.'" *Carhart II*, 550 U.S. at 160. Thus, a ban is rationally related to the legitimate govern-

> The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall.
>
> The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp.[195]

While these facts seem to speak for themselves as to the accuracy of Justice Thomas's description—and to bans' resulting rationality[196]—some have argued that partial-birth abortion bans are irrational because they do not prohibit the more common D&E method of killing a second trimester fetus—pulling it "from a woman's body in dismembered pieces."[197] Justices Stevens and Ginsberg have especially advanced this argument[198] and, in doing so, have heavily relied upon an opinion of Judge Posner.[199] Posner's reasoning therefore warrants a closer look.

Posner's opinion was a dissent to a Seventh Circuit decision upholding partial-birth abortion bans in Illinois and Wiscon-

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mental interest of "'protecting the integrity and ethics of the medical profession.'" *Id.* at 157 (quoting *Glucksberg*, 521 U.S. at 731).

[195] *Carhart I*, 530 U.S. at 1007 (Thomas, J., dissenting). The Court in *Carhart II* also relied on this description of the partial-birth procedure. 550 U.S. at 139.

[196] "The question whether . . . [there is] a legitimate interest in banning the procedure does not require additional authority. . . . In a civilized society, the answer is too obvious, and the contrary arguments too offensive, to merit further discussion." *Carhart I*, 530 U.S. at 1007-08 (Thomas, J., dissenting).

[197] Gorney, *supra* note 33, at 33.

[198] *See Carhart II*, 550 U.S. at 181-82, 191 (Ginsburg, J., dissenting); *Carhart I*, 530 U.S. at 946-47 (Stevens, J., concurring); *id.* at 951-52 (Ginsburg, J., concurring). Their perspective has led to the further allegation that Congress's only purpose in enacting the Ban was to "chip away" at *Roe*. *See Carhart II*, 550 U.S. at 191 (Ginsburg, J., dissenting). *See also* Caroline Burnett, Comment, *The Unconstitutional Purpose Behind the Federal Partial-Birth Abortion Act of 2003*, 42 U.S.F. L. REV. 227 (2007). Similarly, it is asserted that state legislators have supported state bans only to "chip away at the private choice shielded by *Roe*." *Carhart I*, 530 U.S. at 952 (Ginsburg, J., concurring). Judge Posner is credited for originating this "chipping away" characterization of legislative motives. *Id.* It will be shown that this view is untenable.

[199] *See Carhart II*, 550 U.S. at 191 (Ginsburg, J., dissenting); *Carhart I*, 530 U.S. at 946 (Stevens, J., concurring); *id.* at 951-52 (Ginsburg, J., concurring).

sin.[200] He used an example of the abortion of a hydrocephalic baby to demonstrate the bans' irrationality:

> If the physician performing the abortion crushes the fetus's skull in the uterus, killing the fetus while the fetus is still entirely within the uterus, he is not guilty of violating either of the statutes. . . . But if before crushing the fetus's skull the physician turns the fetus around so that its feet are protruding into the vagina, he has committed a felony.[201]

Posner believes that to "any rational person, it makes no difference whether, when the skull is crushed, the fetus is entirely within the uterus or its feet are outside the uterus."[202] How can "the position of the feet"[203] have any moral significance?[204]

Posner's argument fails in part because his facts are wrong. He incorrectly thinks that the partial-birth procedure kills the fetus when it is still entirely within the woman, i.e., its feet are "protruding into the vagina."[205] Posner's misperception is made irrefutably clear in an earlier decision in the same lawsuit, in which he states that "death [occurs] while the body of the fetus [is] in the vagina."[206] There is overwhelming evidence contradicting Posner's conclusion. In part due to instruments used to reduce the distance between the cervix[207] and the outer vaginal opening, pulling the fetus into the vagina generally results in its body being in part, if not largely, outside the woman before it is killed.[208]

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[200] Hope Clinic v. Ryan, 195 F.3d 857 (7th Cir. 1999), *rev'd*, 249 F.3d 603 (7th Cir. 2001) (reversed due to *Carhart I*).

[201] *Id.* at 879 (Posner, J., dissenting).

[202] *Id.*

[203] *Id.*

[204] Posner says there is "[n]o reason of policy or morality that would allow the one [but] would forbid the other." *Id. See* Planned Parenthood of Wis. v. Doyle, 162 F.3d 463, 470 (7th Cir. 1998) (another Posner opinion in which he wonders "how a rational legislature could sense a moral difference between" the two different abortion methods).

[205] *Hope Clinic*, 195 F.3d at 879 (Posner, J., dissenting).

[206] Planned Parenthood of Wis. v. Doyle, 162 F.3d 463, 466 (7th Cir. 1998).

[207] The cervix is the lower "neck of the uterus" through which a fetus moves into the vagina. *See* TABER'S CYCLOPEDIC MEDICAL DICTIONARY 382 (20th ed. 2001).

[208] One doctor uses a ring forceps to pull the cervix toward the outer vaginal opening. Carhart v. Ashcroft, 331 F. Supp. 2d 805, 874-75 (D. Neb. 2004), *aff'd sub nom.* Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005), *rev'd*, 550 U.S. 124 (2007). Sometimes the

Posner's blindness to what the partial-birth procedure actually entails[209] is richly ironic, for later in his opinion he criticizes public support for partial-birth abortion bans as based "on sheer ignorance of the medical realities of late-term abortion."[210] In purporting to instruct the "uninformed," he once more misstates the facts by asserting "that the only difference between [the partial-birth procedure] and the methods of late-term abortion that are conceded all round to be constitutionally privileged is which way the fetus's feet are pointing."[211]

While Posner persistently misstates the facts, Justices Stevens and Ginsberg are unwilling to confront them directly. In their concurring opinions in *Carhart I, they do not even mention* that the partial-birth procedure kills a fetus who is partially, if

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cervix is pulled "to the level of the entrance to the vagina." *Id.* at 875. This in turn means that when the fetal head lodges at the cervix, "the fetal body past the level of the navel may be outside the woman's body." *Id.* at 874. For similar testimony by other doctors, see *id.* at 853, 860, 866, 869, 871, 877, and 881. Based on this evidence, the court concluded "that the cervix of the woman will frequently be at or very near the vaginal opening and sometimes even protruding outside the woman's body. Hence delivery of the fetal body, including the trunk past the navel, 'outside the body' customarily would be anticipated before the surgery begins." *Id.* at 1034 n.160. *See also* Northland Family Planning Clinic, Inc. v. Cox, 487 F.3d 323, 335 n.4 (6th Cir. 2007) (stating that a tenaculum is used to "shorten[], if not eliminate[], the distance between the cervix" and the outer opening of the vagina), *cert. denied*, 128 S. Ct. 873 (2008); *infra* note 214 (Justice Kennedy's acceptance of testimony that fetal death occurs when all but the fetus's head is outside the woman's body). The Federal Ban, of course, does not even apply unless either the fetus's head or half its lower body "is outside the body of the mother." *See supra* note 32 and accompanying text. This is also true of State bans that use the same limiting language, such as Virginia's recently upheld Partial-Birth Infanticide Ban. *See* Richmond Med. Ctr. for Women v. Herring, 570 F.3d 165, 169 & n.1 (4th Cir. 2009). The statutes that Judge Posner criticized, however, did not make ban application conditional on some described part of the fetus being outside the woman at the time of fetal death. The Illinois and Wisconsin statutes spoke only of "partially vaginally deliver[ing] a living human fetus or infant." *See* Hope Clinic v. Ryan, 195 F.3d 857, 862-63 (7th Cir. 1999), *rev'd*, 249 F.3d 603 (7th Cir. 2001) (reversed due to *Carhart I*). Nonetheless, the evidence shows that "partially vaginally deliver[ing]" a fetus necessarily involves dragging the fetus partially, if not largely, outside the woman's body.

[209] Posner is not alone in his mistake. As noted, Professor Laurence Tribe misunderstands the procedure, *supra* notes 110-12 and accompanying text, as does Judge Maryanne Barry, *supra* note 74. She thinks that a partial-birth abortion ban is "nonsensical" because it bases "the demarcation line between abortion and infanticide . . . on where in the woman's body the fetus expires during an abortion." Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127, 144 (3d Cir. 2000).

[210] Hope Clinic v. Ryan, 195 F.3d 857, 880 (7th Cir. 1999) (Posner, J., dissenting), *rev'd*, 249 F.3d 603 (7th Cir. 2001).

[211] *Id.*

not largely, outside the woman's body. Similarly, in their dissent in *Carhart II*, they only refer (unfavorably) to any line between "'abortion and infanticide' based not on whether a fetus can survive outside the womb, but on where a fetus is anatomically located when a particular medical procedure is performed."[212] "[W]here a fetus is anatomically located" is a phrase well-calculated to mask the reality lying behind the nurse's observation[213]—moving fingers and kicking feet were visible because they had already emerged from the woman.[214]

Because Judge Posner and Justices Stevens and Ginsberg never directly engage the reality of the partial-birth procedure, it is hard to take seriously their assertions of ban irrationality. Professor Cynthia Gorney, however, does not dissemble, but graphically describes the partial-birth procedure, including the fact that "'the baby's body is exposed'" when it is killed,[215] i.e., its body is largely outside the woman. Despite her clear-eyed recognition of this crucial fact, Gorney too argues that a ban, because it does not prohibit the classic D&E technique, "makes clear ethical sense only to people who don't spend much time thinking about abortion."[216] "[I]sn't it ethically repugnant to press the case that one method of ending fetal life is worse than another? Isn't this like arguing about whether murder by gunshot is societally preferable to murder by strangulation?"[217]

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[212] 550 U.S. at 186.

[213] *See supra* text accompanying note 195.

[214] "Witnesses to the procedure relate that the fingers and feet of the fetus are moving prior to the piercing of the skull; when the scissors are inserted in the back of the head, the fetus' body, *wholly outside the woman's body* and alive, reacts as though startled and goes limp." *Carhart I*, 530 U.S. 914, 963 (2000) (Kennedy, J., dissenting) (emphasis added) (statement obviously refers to the nurse's testimony, *see supra* text accompanying note 195). The Federal Ban, of course, in instances of feet-first deliveries like the one observed by the nurse, does not even apply unless the fetus's body from above the navel is outside the woman. *See supra* note 32 and accompanying text.

[215] Gorney, *supra* note 33, at 34.

[216] *Id.* at 33.

[217] *Id.* at 44. Gorney specifically addresses these two questions to "the dedicated right-to-life person," *id.*, but her article in effect poses them more generally—via her assertion that because "pulling a fetus from a woman's body in dismembered pieces is legal, medically acceptable, and safe," it makes no "ethical sense" to criminalize the partial-birth procedure. *See id.* at 33. Although it will be shown that this argument is deeply misguided, it has broad support. *See, e.g.*, Nussbaum, *supra* note 13, at 84 (*Carhart II*'s "allusions to the state's respect for fetal life spin like an idle wheel, given that the holding does not actually protect fetal lives, in that it permits a range of alternative

Professor Gorney's question deserves a straightforward answer. Before I do so, however, it is important to emphasize the precise legal issue under discussion—whether partial-birth abortion bans are rationally grounded. The question thus is not whether one agrees or disagrees with Gorney's critique. Nor is the question whether ban supporters can convince everyone else to endorse bans. Rather, all that ban proponents must do is make a rational case for their position.[218] This task is readily accomplished, as one of Gorney's own illustrations makes clear.

Gorney points out that a woman twenty-eight weeks pregnant who wants an abortion to better fit her prom dress can legally get one under *Roe*.[219] Does this mean that it makes no

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techniques for late-term abortion") (footnote omitted); *supra* text accompanying notes 110-111 (Professor Laurence Tribe's similar argument). *Cf.* Jack M. Balkin, *How New Genetic Technologies Will Transform* Roe v. Wade, 56 EMORY L.J. 843, 849 & n.27 (2007) (in view of alternative permissible ways to kill the fetus, *Carhart II* can be criticized for emphasizing the state interest in potential life); Susan Frelich Appleton, *Gender, Abortion, and Travel After* Roe*'s End*, 51 ST. LOUIS U. L.J. 655, 661-62 (2007) (legal alternatives of killing the fetus demonstrate that partial-birth abortion bans serve only the state's "ideological or symbolic interests").

[218] Consider Justice Kennedy's response in *Carhart I* to Justices Ginsberg's and Stevens's assertion that Nebraska's partial-birth abortion ban was irrational because it did not prohibit D&E abortion:

> The issue is not whether members of the judiciary can see a difference between the two procedures. It is whether Nebraska can. . . . [The partial-birth procedure's] stronger resemblance to infanticide means Nebraska could conclude . . . [it] presents a greater risk of disrespect for life and a consequent greater risk to the [medical] profession and society, which depend for their sustenance upon reciprocal recognition of dignity and respect. The Court is without authority to second-guess this conclusion.

530 U.S. at 962-63 (Kennedy, J., dissenting).

[219] Gorney, *supra* note 33, at 40. This observation succinctly captures *Roe*'s impact on state attempts to limit either the permissible reasons for abortion or the point during pregnancy at which abortion is no longer allowed—*Roe* slammed the door on all such regulatory efforts. Gorney thus acknowledges the validity of abortion opponents' summary of the *Roe* standard: "'[L]egal at any time, for any reason, all the way through the ninth month of pregnancy.'" *See id.* at 39-40. This permissiveness is mandatory due to the broad nature of the health exception that limits a state's power to prohibit even post-viability abortions. *Id.* at 39. *See infra* text accompanying note 227. Gorney's accuracy in describing *Roe* is commendable. Incorrect depictions are legion, in particular those stating that *Roe* only prohibited state restrictions on early abortions. Most surprisingly, even Justice O'Connor has made this mistake. SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW 45 (2003) (*Roe* "struck down as unconstitutional limitations by states on abortions in the first three months of pregnancy"). For additional examples, see Jack M. Balkin, Roe v. Wade: *An Engine of Controversy*, *in* WHAT ROE V. WADE SHOULD HAVE SAID 24 n.4 (Jack M. Balkin ed., 2005) (describing a 2003 ABC News-

"ethical sense" to punish as infanticide the killing of babies of that age who have been born prematurely? Of course not. Prohibiting the killing of born infants is essential in any civilized society. Gorney shares this view,[220] despite her awareness that society, due to *Roe*, cannot effectively prohibit the killing of the same baby within the womb.

If protecting babies born prematurely is rational, then so are partial-birth abortion bans. The partial-birth technique kills a baby in the midst of a birth process, just inches from being fully born. Bans are thus supported by the same moral reasoning underlying laws punishing infanticide. Interestingly, Posner provides unintended corroboration in the two opinions already cited. In his heralded 1999 dissent, he defends laws against infanticide because it, unlike feticide, occurs after birth. "Once the baby emerges from the mother's body," Posner opined, killing it can no longer be justified.[221] But there is a right to kill "as long as the baby remains within the mother's body."[222] In the partial-birth process the baby is killed—despite Posner's apparent unawareness of the fact—when it no longer "remains within the mother's body."[223] Why then is it irrational to prohibit the procedure? In his 1998 opinion, Posner "do[es] not doubt" that a state could criminalize the "killing [of] a live baby that is half-

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Washington Post poll that characterized *Roe* "as giving women the ability to get abortions if they want one at any time during the first trimester"); Gregg Easterbrook, *Abortion and Brain Waves*, THE NEW REPUBLIC, Jan. 31, 2000, at 21, 24 (*Roe* "all but ban[ned]" abortion in the third trimester); and Manny Fernandez, *Abortion Protest Draws Thousands*, WASH. POST, Jan. 23, 2004, at B1 (*Roe* "prevented states from restricting abortion in the first trimester of pregnancy"). For other examples of accurate descriptions of *Roe*, see David Brown, *Late Term Abortions; Who Gets Them and Why*, WASH. POST, Sept. 17, 1996, at Z12 ("Contrary to a widely held public impression, third-trimester abortion is not outlawed in the United States. . . . [L]ife-threatening conditions need not exist in order for a woman to get a third-trimester abortion."), and Roy Rivenburg, *supra* note 30, at E8 ("If a woman can find a doctor who says her emotional health is disturbed by a pregnancy, she can get an abortion at *any* stage of pregnancy.").

[220] Professor Gorney has referred to infanticide as an "unquestionable wrong." *See* GORNEY, *supra* note 40, at 346. While this does not necessarily connote her support of laws against the practice, elsewhere she has implicitly assumed the legitimacy of laws against "child-killing." *See* Cynthia Gorney, *Reversing Roe: Is Mainstream Right-to-Life Ready for an Abortion Ban?*, THE NEW YORKER, June 26, 2006, at 46, 52.

[221] Hope Clinic v. Ryan, 195 F.3d 857, 882 (7th Cir. 1999) (Posner, J., dissenting), *rev'd*, 249 F.3d 603 (7th Cir. 2001).

[222] *Id.*

[223] *See supra* notes 206-08 and accompanying text.

born."[224] It has been shown that this is precisely what the partial-birth procedure entails.

Nor are bans rendered irrational by their failure to prohibit classic D&E.[225] Judge Posner, a chief proponent of this view, contradicts himself by acknowledging that a state can appropriately criminalize "as infanticide" the killing of a baby in the birth canal during "the course of a normal labor."[226] But, as Professor Gorney has correctly stated, *Roe* allows the abortion of even a full-term baby: "If the doctor attests that she needs it . . . the state is not supposed to interfere, no matter how advanced her pregnancy is."[227] Why then, if partial-birth abortion bans are irrational due to their failure to cover D&E, isn't Posner's defense of such infanticide laws also irrational due to their failure to ban full-term abortions? Both laws criminalize killing a baby while it is emerging from its mother, but neither prohibits killing that same baby before it begins to emerge. Consequently, either both laws are irrational or neither is. I obviously endorse the latter option.[228] The emergence of a child from the mother's body has a broader significance than Posner is able to acknowledge. Once the birth process begins—whatever its nature—the child is a proper subject of governmental protection untrammeled by *Roe*.[229]

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[224] Planned Parenthood of Wis. v. Doyle, 162 F.3d 463, 471 (7th Cir. 1998). *See supra* notes 119-121 and accompanying text.

[225] In the *Carhart II* oral arguments, Justice Ginsburg rejected as "beside the point" the Solicitor General's ban defense based on concerns about infanticide. Transcript of Oral Argument at 16, Gonzales v. Carhart, 550 U.S. 124 (2007) (No. 05-380). Why? Because bans do not prohibit the killing of the same fetus "inside the womb." *Id.* at 4. In response, the Solicitor General asked Justice Ginsberg to consider a "lawful post-viability abortion":

> There is a problem with the mother's health, there is a problem with her life so it's a lawful post-viability abortion. I don't think that anybody thinks that the law is or should be indifferent to whether in that case fetal demise takes place in utero or outside the mother's womb. The one is abortion, the other is murder.

Id. at 16. This reply admittedly was somewhat opaque. Its intended, compelling point was that the freedom to kill a child in the womb does not bestow unlimited power to kill it regardless of its location. *See supra* notes 219-20 and accompanying text. But the Solicitor General, in addition to making post-viability abortions sound more restricted than they are, *see supra* note 219 and accompanying text, failed to clarify what "outside the mother's womb" scenario he had in mind—presumably a premature birth. In any event, Justice Ginsburg either missed or deliberately ignored the point the Solicitor General was trying to make. She replied that "if this case were limited to post-viability abortions it would be a different matter." Transcript, *supra* at 17. This comment is completely non-responsive. If bans applied only post-viability, women still could freely have their viable babies killed in utero. *See supra* note 219 and accompanying text. Would post-viability bans therefore be irrational? It thus is clear that Justice Ginsberg in no meaningful sense "corrected" the Solicitor General's emphasis on infanticide prevention, as has been claimed. *See* Burnett, *supra* note 198, at 261.

[226] *See supra* notes 119-20 and accompanying text.

[227] Gorney, *supra* note 33, at 39. *See supra* note 219 and accompanying text.

The gap in ban coverage admittedly leaves most second trimester fetuses unprotected. But any effort to criminalize D&E would plainly be stricken under the *Roe/Casey* standard. Ban proponents can hardly be branded as "irrational" for failing to prohibit what cannot be constitutionally prohibited.[230] They acted prudently by attacking what was constitutionally open to attack, whether under the theory defended in this Article—that the partial-birth procedure is not encompassed by the abortion right—or on the grounds that *Roe/Casey* permit partial-birth abortion bans.

It is hardly novel for lawmakers to combat incrementally what they believe to be evil. Abraham Lincoln first fought slavery by attempting to restrict its expansion, which he believed the Constitution allowed.[231] He delayed assaulting the institution of slavery itself until changed circumstances made that constitutionally permissible.[232] Legal change may someday permit legislatures so inclined to accord more protection to fetal life. Until that day comes, defending the lives of fetuses who have begun the birth process is a cause to be praised, not belittled as irrational.[233]

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[228] Additional support for the rationality of partial-birth abortion bans comes from information on how English physicians are advised to handle the problem of fetuses born alive following abortion attempts. Under English law, such a fetus, if viable, "becomes a child and a deliberate act that causes the death of a child is murder, even if that deliberate act precedes the birth." Vadeyar, et. al., *supra* note 83, at 1159. The authors therefore state "that if an abortion is taking place at a gestation at which the fetus is capable of remaining alive it is imperative that feticide is performed prior to delivery." *Id.* Does the fact that a fetus can legally be killed before delivery discredit the law designed to protect it after its birth? The obvious answer is "no." Similarly, laws protecting fetuses in the delivery process make "ethical sense," contrary to Professor Gorney's assertion, *supra* text accompanying note 216, even though those same fetuses could be legally killed moments before. (For the argument that it is irrelevant that most fetuses killed via the partial-birth procedure are not viable, see *supra* notes 159-72 and accompanying text.)

[229] *But cf. infra* notes 251-67 and accompanying text (discussing how the protection *Roe* affords to dismemberment D&Es impacts partial-birth abortion bans).

[230] Similarly, opponents of pornography are not irrational for failing to seek to criminalize the private possession of pornography, —since such an effort would inevitably fall to constitutional challenge. *See* Stanley v. Georgia, 394 U.S. 557 (1969). But they also are act rationally in enacting constitutionally permissible prohibitions of the private possession of child pornography. *See* Osborne v. Ohio, 495 U.S. 103 (1990); New York v. Ferber, 458 U.S. 747 (1982).

[231] *See* Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262 (Roy P. Basler ed., 1953).

B. Implications for Federal and State Bans

1. Federal Ban

Carhart II left the door open for an as-applied challenge to the Federal Ban due to its lack of a health exception.[234] But it can be argued that under a rational basis standard a health exception is unnecessary. Lawmakers acted to prohibit partial-birth abortion because it closely approaches infanticide. Surely no one thinks that a law prohibiting infanticide must have a health exception. There is no reason to treat partial-birth abortion bans differently. In fact, differential treatment—requiring a health exception—would be especially inappropriate because bans are inapplicable if the fetus is killed prior to its partial delivery.[235] Thus, by killing the child while it is still in the womb,[236] any perceived health benefits that intact deliveries offer women arguably can still be realized without thwarting the purpose of deterring infanticide.[237]

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[232] The Emancipation Proclamation, for example, was not issued until Lincoln felt it could be justified "[a]s a military measure" to deprive the enemy of property. *See* DAVID HERBERT DONALD, LINCOLN 456 (1995).

[233] Ban opponents are not the only ones who have criticized bans' emphasis upon fetal location. At least one pro-life advocate has expressed concern about stressing physical location in defending the value of human life. To Richard Stith, "location cannot make an ontological difference." Stith, *supra* note 104, at 263. In terms of their "real worth," it does not matter whether humans are within the womb, partially outside the womb, or wholly outside the womb. *See id.* at 261, 272. Rather, "human nature, membership in our species," is what actually underlies "human dignity." *Id.* at 272. From this perspective, partial-birth abortion bans are problematic because they are grounded on a morally irrelevant factor—physical location. But in this regard aren't partial-birth abortion bans like Born-Alive Infant Protection Acts? Physical location—complete separation—is what puts the latter beyond *Roe*'s scope. *See supra* notes 80-86 and accompanying text. They thus erect "a barrier to stop the right to choose from expanding beyond birth." Stith, *supra* note 104, at 275. But, as Professor Stith recognizes, the laws do not interfere "with the right to life expanding into pregnancy." *Id.* Partial-birth abortion bans are no different. They move the barrier to choice back a little further—to the birth process—but they do not preclude the argument that wholly intrauterine life should be protected as well. Any attempt, however, to further protect prenatal life is currently stymied by *Roe. But see infra* note 272.

[234] *See supra* note 18 and accompanying text.

2. State Bans

The potential impact of a rational basis analysis on state partial-birth abortion laws is a complicated subject, and it is beyond the scope of this Article fully to explore it. Rather, the types of issues that might arise[238] will be indicated by briefly considering two state bans—in Virginia and Michigan—whose constitutionality has been assessed subsequent to *Carhart II.* The key inquiry in both cases was whether the challenged bans[239] conformed closely enough to the Federal Ban to be upheld.

Virginia's ban was initially stricken by a Fourth Circuit panel because, unlike the Federal Ban, it was interpreted to apply to doctors intending to perform dismemberment D&Es, but who instead accidentally bring an intact fetus substantially outside the woman.[240] Since regular D&E is the most common second-trimester abortion technique, subjecting doctors who perform it to the risk of prosecution was held to impose an undue burden on the woman's abortion right.[241] The Fourth Circuit, en banc, reversed and upheld the statute.[242] The court acknowledged that the Virginia ban differs from the Federal Ban by covering doctors who intend a D&E, but unintentionally cause an intact partial delivery.[243] Nonetheless, the ban was constitutional because it has other features that "clearly delineate[] the rare circumstances in which a doctor [would] incur liability, thus enabling a doctor to perform a standard D&E without fear that accidental [substantial] emergence of the fetus" would in itself result in criminal prosecution.[244]

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[235] *See Carhart II*, 550 U.S. 124, 147-48, 164 (2007).

[236] Common methods include injecting "the fetus with a toxic agent such as potassium chloride or digoxin." Evans v. Kelley, 977 F. Supp. 1283, 1318 (E.D. Mich. 1997).

[237] Justice Ginsberg rejects this assertion due to the health risks associated with killing the fetus via injection. *Carhart II*, 550 U.S. at 180 n.6. The weakness in this argument is the apparent routineness with which prior fetal demise is induced. Dr. Leroy Carhart, for example, almost always does so for fetuses of at least eighteen weeks gestational age. Carhart v. Ashcroft, 331 F. Supp. 2d 805, 854, 907-08 (D. Neb. 2004), *aff'd sub nom.*, Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005), *rev'd*, 550 U.S. 124 (2007). Further, the *Los Angeles Times* reported that of the 3,000 to 5,000 yearly partial-birth procedures known to one abortion proponent in 1995, *every single one* was preceded by killing "the fetus in the womb—by injecting it with poison or cutting the umbilical cord." Rivenburg, *supra* note 30 at E8. This high incidence of killing the fetus beforehand must mean that doctors have determined that doing so is not particularly risky.

[238] The lack of a health exception could also be grounds for challenging state bans, if, for example, a state decided that its constitution provides more protection to the abortion right than that conferred by the United States Constitution. The potential impact of a rational basis analysis on the asserted requirement of a health exception has already been discussed. *See supra* notes 234-37 and accompanying text.

[239] Michigan's statute was not worded as a ban of the partial-birth procedure, *see infra* notes 245-46 and accompanying text, but that plainly was its purpose.

[240] Richmond Med. Ctr. for Women v. Herring, 527 F.3d 128, 137-39 (4th Cir. 2008), *rev'd en banc*, 570 F.3d 165 (4th Cir. 2009). The Federal Ban does not apply to such

Michigan's statute did not even mention the partial-birth procedure. Instead, "it creates a protected legal status for a partially-delivered fetus that it terms a 'perinate.'"[245] A perinate is

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situations because it requires that a doctor have had the intent to initiate an intact procedure: "If the doctor intends to remove the fetus in parts from the outset, the doctor will not have the requisite intent to incur criminal liability." *Carhart II*, 550 U.S. at 151.

[241] *See Richmond Med. Ctr. For Women*, 527 F.3d at 145-46.

[242] Richmond Med. Ctr. for Women v. Herring, 570 F.3d 165 (4th Cir. 2009) (en banc).

[243] *Id.* at 176.

[244] *Id.* at 179. Consider, for example, a doctor who intends to procure a dismemberment D&E, but instead faces a substantially delivered fetus whose head is "lodged in the cervix." *Id.* at 178. The court believed that this situation would "almost always endanger the mother's life." *Id.* The Virginia ban's life-of-the-mother exception would allow the doctor to "complete the D & E procedure . . . [with] an unequivocal affirmative defense to any criminal liability under the Virginia Act." *Id.*

[245] Northland Family Planning Clinic, Inc. v. Cox, 487 F.3d 323, 327 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 873 (2008). The statute in dispute, the Legal Birth Definition Act, MICH. COMP. LAWS ANN. §§ 333.1081-85 (West Supp. 2008), was Michigan's third attempt to prohibit the partial-birth procedure. Its first effort, a partial-birth abortion ban, was struck down in *Evans v. Kelley*, 977 F. Supp. 1283 (E.D. Mich. 1997). Its second effort, entitled the Infant Protection Act, was invalidated in *WomanCare of Southfield v. Granholm*, 143 F. Supp. 2d 827 (E.D. Mich. 2000). The third attempt, entitled the Legal Birth Definition Act, was passed in 2003, but vetoed by the Governor. *See* Betsy DeVos, *Voters Rebuke Partial-Birth Abortion Veto*, THE GRAND RAPIDS PRESS, June 24, 2004, at A15, *available at* 2004 WLNR 17813169. It was passed again in 2004, having been proposed by an initiative petition, a process that insulated the measure from the Governor's veto power. *Id.* The petition drive garnered over 460,000 signatures. *Id.* This third effort also ultimately failed. *See* Northland Family Planning Clinic, Inc., v. Cox, 394 F. Supp. 2d 978 (E.D. Mich. 2005), *aff'd*, 487 F.3d 323 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 873 (2008). Undeterred, Michigan lawmakers in 2008 passed another partial-birth abortion ban, but it was vetoed by Governor Jennifer Granholm. *See* Chris Christoff, *Gov. Granholm Vetoes Abortion Bill, Mandatory Helmet Bill*, DETROIT FREE PRESS, June 13, 2008, *available at* 2008 WLNR 11198631. An override attempt was contemplated. *Id.* At

"'a live human being at any point after which any anatomical part of the human being is known to have passed beyond the . . . [outer vaginal opening] until the point of complete expulsion or extraction from the mother's body.'"[246] The Sixth Circuit invalidated the statute because it lacked those "anatomical landmarks," i.e., the entire head or the body from above the navel downward, that ensure the Federal Ban does not apply to D&E's.[247] Because the challenged statute prohibited standard D&E abortions, it imposed an unconstitutional undue burden on the abortion right.[248]

How might the introduction of a rational basis analysis have impacted the resolution of these two cases? Concerning the issue raised in the Virginia litigation, a constitutional challenge to bans applicable to doctors who do not from the outset intend to procure an intact, partial delivery would seemingly more likely fail under a rational basis approach than under the *Carhart II* analysis, premised in *Roe/Casey*. After all, an abortionist's intent surely is irrelevant to the legislative goal of preventing infanticide. If an intact, living fetus is partially born, killing it constitutes infanticide no matter what abortion technique was initially intended. The recent Fourth Circuit decision, though, shows that such an expanded ban can be upheld even under *Carhart II*.[249] As stated by Judge Wilkinson's concurring opinion, "[t]he state's interest in protecting life recognized in [*Carhart II*] does not vanish when the intact delivery of the child is unintentional. . . . The state may prohibit a deliberate and unconscionable act against the intact, partially born child, regardless of how the child got there."[250] Consequently, a rational basis

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present, another ban, introduced in 2009 and tracking the language of the Federal Ban, is under consideration by the Michigan legislature. Partial Birth Abortion Ban Act., S.B. 147, 148; H.B. 4212, 4213 (2009).

[246] *Northland Family Planning Clinic*, 487 F.3d at 327.

[247] *Id.* at 336-37. The statute is triggered when "'any anatomical part'" passes outside the woman. *Id.* at 327. "'Anatomical part' means any portion of the anatomy of a human being that has not been severed from the body, but not including the umbilical cord or placenta." MICH. COMP. LAWS ANN. § 333.1085(a) (West Supp. 2008).

[248] *See Northland Family Planning Clinic*, 487 F.3d at 336-37.

[249] *See supra* notes 242-44 and accompanying text.

[250] Richmond Med. Ctr. for Women v. Herring, 570 F.3d 165, 181 (4th Cir. 2009) (Wilkinson, J., concurring) (en banc).

approach is not an absolute prerequisite for according constitutional legitimacy to broader bans.

But a potential constitutional obstacle remains—the possible negative impact of more expansive bans on the availability of dismemberment D&Es.[251] These standard D&Es do not involve partial births,[252] and thus would still be subject to *Casey*'s undue burden standard. One could defend a broader ban's constitutionality by following the lead of the Fourth Circuit in ultimately upholding Virginia's ban—emphasize other statutory safeguards that would protect doctors from liability in such instances.[253] This approach convinced the six judges in the majority, but not the five dissenting judges, who thought that the alleged protections for doctors performing dismemberment D&Es were inadequate.[254] A rational basis approach would provide a way to avoid this debate about the effectiveness of Virginia's particular statutory safeguards. As noted, partial-birth abortion bans already provide a safe harbor for abortionists who do not want to risk prosecution—kill the fetus before taking action that could lead to its intact extraction. An injection to stop the fetal heart makes a ban violation impossible.[255] Subjecting an abortionist to this choice arguably is justified by the legitimate governmental purpose of deterring infanticide.[256] Nor is injection barred by concern for health risks to the woman. While there is some risk,[257] it is counterbalanced by the health advantages of avoiding a dismemberment D&E.[258] Injection is also a more humane way to kill the fetus.[259]

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[251] The Fourth Circuit panel initially struck down the Virginia ban for precisely this reason. *See supra* notes 240-41 and accompanying text.

[252] *But see* the discussion in *infra* notes 260-61 and accompanying text.

[253] *See supra* note 244 and accompanying text.

[254] The dissenters believed that the majority's interpretation of the life-of-the-mother exception was flawed because it would also permit even intentional partial-birth extractions to proceed without liability for the doctor. 570 F.3d at 193-94 (Michael, J., dissenting).

[255] *See supra* text accompanying note 235.

[256] Critics would undoubtedly brand this suggestion as "irrational" because if the injection alternative kills the fetus, how can one reasonably claim that it furthers a state interest against infanticide? This critique, like the similar criticism based on bans' inapplicability to D&E abortion, gives insufficient weight to a fetus's location at the time of its death. *See supra* notes 219-33 and accompanying text.

[257] *See supra* note 237.

Concerning the Michigan statute, this Article has earlier stressed that the anatomical landmarks it lacks ensure that the partial-birth procedure does entail, contrary to Judge Posner's assertion, killing a "half-born" baby.[260] But if the *Roe* abortion right is delimited by the onset of birth,[261] should a state be permitted to extend legal protection to babies emerging from the mother's body, but not yet "half-born"? A living, intact baby begins the birth process whenever any part of its body, however small, emerges from its mother. This is so even when caused by an abortionist's pulling an extremity outside the womb for the purpose of initiating a dismemberment D&E.[262] Despite this factual reality, a legislature can only protect what the Court allows to be protected. A triggering standard of "'any anatomical part'" reveals a contradiction in the impact of *Roe*, even if properly interpreted. A partial-birth prohibition at this earliest stage of delivery should be allowed due to *Roe*'s "onset of birth" limitation, but any such ban would impermissibly infringe upon the right to a D&E abortion.[263]

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[258] The decisions are replete with assertions that D&Es pose greater health risks to women than the partial-birth procedure. These reputed safety disadvantages were the principal factual basis for the view that partial-birth abortion bans must include a health exception. *See, e.g.*, Carhart v. Gonzales, 413 F.3d 791, 801-02 (8th Cir. 2005), *rev'd*, 550 U.S. 124 (2007); Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 1000-01 (N.D. Cal. 2004), *aff'd sub nom.* Planned Parenthood Fed'n of Am. v. Gonzales, 435 F.3d 1163 (9th Cir. 2006), *rev'd sub nom.* Gonzales v. Carhart, 550 U.S. 124 (2007).

[259] One motivation behind the Federal Ban was concern over fetal pain: "[D]uring a partial-birth abortion procedure, the child will fully experience the pain associated with piercing his or her skull and sucking out his or her brain." Congressional Finding 14(M), in notes following 18 U.S.C. § 1531 (Supp. V 2000). Many of the ban cases contain discussions of the fetus's capacity to feel pain. The conclusions expressed vary. One federal district judge accepted as a fact "unrebutted . . . credible evidence that . . . [the partial-birth procedure] subject[s] fetuses to severe pain." Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 479 (S.D.N.Y. 2004), *aff'd sub nom.* Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278 (2d Cir. 2006), *vacated*, 224 Fed. Appx. 88 (2d Cir. 2007). Another judge found that "[t]he issue of whether fetuses feel pain is unsettled in the scientific community." Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 1002 (N.D. Cal. 2004), *aff'd sub nom.* Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163 (9th Cir. 2006), *rev'd sub nom.* Gonzales v. Carhart, 550 U.S. 124 (2007). In any event, the court said the issue is irrelevant, for if a fetus does feel pain, it would experience "no less and in fact [what] might be greater [pain]" in a D&E abortion. *Id.* A third judge assumes that a non-viable fetus is able to feel pain "at some point during its gestation," but believes the issue to be only "marginally" legally relevant, if at all, in part because all methods of killing the fetus would be painful. Carhart v. Ashcroft, 331 F. Supp. 2d 805, 1029 (D. Neb. 2004), *aff'd sub nom.* Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005), *rev'd*, 550 U.S. 124 (2007). While the court suggests that it is impossible to differentiate levels of pain between death by being "torn apart" in a D&E abortion versus death by heart stoppage due to injection, *see id.*, this conclusion is plainly counterintuitive.

[260] *See supra* notes 207-08 and accompanying text.

[261] *See supra* notes 87-121 and accompanying text.

One solution to this dilemma[264] would be to rewrite the Michigan statute to track the Federal Ban, thus presumably ensuring constitutional validity. But this obviously sacrifices the principle that any partially born baby is a proper subject of state protection.[265] An alternative is to argue that the present Michigan statute satisfies the rational basis test. After all, there is no meaningful moral distinction based on how much of a baby is outside the woman.[266] Doctors' freedom to perform D&E's can be preserved by the practice of killing the fetus before beginning any D&E procedure.[267]

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[262] Justice Thomas, in *Carhart I*, argued that standard D&Es do not involve birth because the concept of "'delivery'" does not encompass removing "the child from the uterus piece by piece." *Carhart I*, 530 U.S. 914, 990 (2000) (Thomas, J., dissenting). The dismemberment that D&Es entail, however, usually does not occur completely within the womb. *See infra* note 263. Thus, a baby typically is still living and intact when its first limb is torn off.

[263] A D&E abortion typically does not tear the fetus apart completely inside the womb. Rather, the doctor pulls a fetal body part, e.g., a leg, out of the womb and often outside the woman altogether before wrenching it off. The disarticulation is possible due to the resistance caused when the rest of the fetus's body lodges at the cervix. Thus, in a D&E abortion, there will often be times when an intact fetus is partially drawn outside the woman before it is killed. *See, e.g.*, Carhart v. Ashcroft, 331 F. Supp. 2d 805, 860, 866, 871, 877-78 (D. Neb. 2004), *aff'd sub nom.* Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005), *rev'd*, 550 U.S. 124 (2007). Applying a partial-birth abortion ban to this situation would obviously subject doctors who perform D&E's to the risk of a ban violation. *Cf.* Planned Parenthood of Cent. N.J. v. Verniero, 41 F. Supp. 2d 478, 497 & n.11 (expressing concern that interpreting *Roe* as inapplicable to partially born fetuses "could potentially exclude all conventional abortion procedures from constitutional protection"), *aff'd sub nom.* Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127 (3d Cir. 2000). This result could be avoided by retaining the previously criticized intention requirement. *See supra* text accompanying note 249.

[264] It might be argued that the very existence of this dilemma demonstrates that the interpretation of *Roe* defended in this Article is incorrect. After all, is it plausible that the Court would have written a self-contradictory opinion? The problem with this critique is that rejecting the "*Roe* is inapplicable" perspective does not avoid the issue of self-contradiction. If *Roe* is interpreted as still applying once the birth process begins, then what is one to make of all the evidence suggesting that this is not what the *Roe* Court intended? *See supra* notes 92-141 and accompanying text.

[265] It would also sacrifice the argument that the intention of the doctor should be irrelevant to the legal protection offered to partially born babies. *See supra* text accompanying note 249.

CONCLUSION

With respect to what he calls "live-birth abortion," Justice Scalia thinks it "is quite simply absurd" to believe "that the Constitution of the United States . . . prohibits . . . banning this visibly brutal means of eliminating our half-born posterity."[268] Scalia is correct, but for reasons beyond those given in his opinion.[269] As has long been argued, the partial-birth procedure is not encompassed by the abortion right conferred by *Roe*.[270] Consequently, current partial-birth jurisprudence applies the wrong test. State bans and the Federal Ban are properly subject only to rational basis review.

Prominent ban critics, including Judge Posner and Justices Stevens and Ginsberg, assert that bans are irrational because they do not prohibit D&E abortion. To them, the right to kill by one method bestows an unrestrained right to kill. But D&E is protected by *Roe*, whereas the partial-birth procedure is not.[271] Lawmakers thus have much more freedom to act against the latter.[272] Because they can reasonably conclude that killing a child during its birth verges on infanticide, banning the partial-birth procedure plainly satisfies the rational basis test.

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[266] It can also be argued that there is no meaningful moral distinction based on whether *any* of the baby is outside the woman. *See supra* note 233. But some part of a living, intact fetus must be outside of the woman to trigger the "*Roe* is inapplicable" argument.

[267] *See supra* notes 255-56 and accompanying text. As previously discussed, this alternative arguably does not impermissibly put women's health at risk, *see supra* notes 257-58 and accompanying text, and also is supported by humanitarian concern for the fetus. *See supra* note 259 and accompanying text.

[268] *Carhart I*, 530 U.S. at 914, 953 (2000) (Scalia, J., dissenting). Scalia's quote speaks to the specific issue of whether the Constitution prohibits state bans, but he no doubt would say the same thing in reference to the Federal Ban. *See Carhart II*, 550 U.S. at 145-46 (Justice Kennedy's majority opinion, which Justice Scalia joined, argues that *Casey*'s emphasis on the legitimate state interest in fetal life requires sustaining the Federal Ban against constitutional challenge).

[269] Justice Scalia believed that *Casey* did not support the Court's decision to invalidate Nebraska's ban. *See Carhart I*, 530 U.S. at 953-54 (Scalia, J., dissenting). Whether Justice Scalia was correct as to how *Casey* should be applied to state partial-birth abortion bans is beyond the scope of this Article, which instead argues that such statutes are not subject to *Casey*.

[270] This Article attempts to establish this proposition beyond challenge. At the very least, it is hoped that the Article demonstrates that the "*Roe* is inapplicable" argument has substantial merit and that courts have been wrong to respond to it dismissively or derisively. *See supra* notes 65-74 and accompanying text.

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[271] The principal point of this Article is that *Roe*, properly interpreted, does not apply to killing a baby during its birth. There is, of course, an alternative argument for the constitutionality of partial-birth abortion bans. As *Carhart II* demonstrates, bans can be written in a way that satisfies the *Roe/Casey* standard.

[272] For an argument that *Carhart II* opens the door to banning dismemberment D&Es, see Stephen G. Gilles, *As Justice Kennedy Said . . .*, FIRST THINGS, Jan. 2008, at 18, *available at* http://www.firstthings.com/article/2007/12/002-as-justice-kennedy-said----6. Evaluating this contention is beyond the scope of this Article.

LIABILITY OF WEB 2.0 INTERMEDIARIES UNDER STATE CONSUMER FRAUD STATUTES: A CASE STUDY

*Anthony Ciolli**

On March 18, 2008, New Jersey Attorney General Anne Milgram announced that her office, together with the New Jersey Division of Consumer Affairs, had begun a state investigation into the operations of JuicyCampus.com, "[a] website that publishes anonymous gossip about college students."[1] In a press release, Attorney General Milgram accused JuicyCampus of potentially "violating the New Jersey Consumer Fraud Act through unconscionable commercial practices and misrepresentations to users."[2] Specifically, the Attorney General alleges that while the website's terms of service "require[s] posters to agree that they will not post content that is abusive, obscene or invasive of another's privacy" and "tells the public that this offensive content may be removed," the website itself "apparently lacks tools to report or dispute this material."[3] Less than a year after initiating its investigation, JuicyCampus voluntarily shut down.[4]

This Essay will examine the potential liability of Web 2.0 intermediaries under the New Jersey Consumer Fraud Act[5] and related consumer fraud statutes, using JuicyCampus as a case study. Part I will provide a brief overview of the relevant statutory provisions of the New Jersey Consumer Fraud Act and case law interpreting it. Part II will succinctly summarize the controversy surrounding the JuicyCampus website and examine its terms of service and other policies. Part III shall argue that not only are JuicyCampus and other Web 2.0 intermediaries immune from liability under such statutes for misrepresentations related to enforcement of their terms of services provisions due to section 230 of the Communications Decency Act, but would be free from liability even in the absence of the section 230 safe harbor. However, it is possible that JuicyCampus and potentially other intermediaries may be found liable under the Act for misrepresentations made to advertising networks such as Google AdSense. The Essay concludes with a discussion of the public policy implications of enforcing the New Jersey Consumer Fraud Act and similar statutes in such a way against Web 2.0 intermediaries.

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[1] Press Release, Office of the Att'y Gen., State Subpoenas Records From JuicyCampus.com As It Investigates the College Gossip Website (Mar. 18, 2008), *available at* http://www.nj.gov/oag/ newsreleases08/pr20080318b.html.

[2] *Id.*

[3] *Id.*

[4] Posting of Matt Ivester to Official Juicy Campus Blog, http://juicycampus.blogspot.com/ 2009/02/juicy-shutdown.html (Feb. 5, 2009).

[5] N.J. STAT. ANN. § 56:8-1 et seq. (2007).

I. THE NEW JERSEY CONSUMER FRAUD ACT

The New Jersey Consumer Fraud Act (hereinafter "the Act") has been described by some lawyers as "one of the strongest [c]onsumer statutes in the country."[6] The statute reads, in pertinent part,

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.[7]

The Act, originally enacted in 1960 for the purpose of "combat[ing] the increasingly widespread practice of defrauding the consumer,"[8] vests the New Jersey Attorney General "with broad powers to investigate, subpoena records, and seek injunctions prohibiting fraudulent conduct and orders of restitution to make whole any person damaged by conduct violating the act."[9] In its current form, the Act also allows individual consumers to bring their own private causes of action to obtain treble damages, but only provided that such an individual has suffered an ascertainable loss.[10]

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[6] Posting of Jonathan Rudnick to New Jersey Lemon Lawyer Blog, http://www.newjerseylemonlawlawyerblog.com/2008/02/new_jersey_consumer_fraud_act.html (Feb. 3, 2008).

[7] N.J. STAT. ANN. § 56:8-2 (2007).

The Act itself does not define key terms such as "unconscionable commercial practice." As a result, it has been up to the courts to determine how such terms are to be applied in practice. The Supreme Court of New Jersey, however, has repeatedly held that the Act, as remedial legislation, must be "liberally construed in favor of protecting consumers."[11] Thus, courts interpreting the statute have consistently favored expansive definitions of all relevant phrases.

II. THE JUICYCAMPUS CONTROVERSY

JuicyCampus.com, a message board "founded on August 1, 2007 with the simple mission of enabling online anonymous free speech on college campuses,"[12] has generated a significant amount of media attention and scrutiny during its relatively short existence. Described as a "rapidly growing gossip site that solicits content with the promise of anonymity," the message board's content has over time "devolved from innocuous tales of secret crushes to racist tirades and lurid finger-pointing about drug use and sex, often with the alleged culprit identified by first and last name."[13]

According to the website's founder, Matt Ivester, "[t]he idea is that [JuicyCampus] would be a fun place for lighthearted gossip. Thinking back to my college days, I can remember some of the ridiculous and hilarious things me and my friends would do, and this would be a place to share that."[14] When confronted with calls by various school administrators, including those at his alma mater, Duke University, to shut down or more closely moderate his website, Ivester replied,

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[8] Cox v. Sears Roebuck & Co., 138 N.J. 2, 14 (1994) (quoting Senate Committee, *Statement to the Senate Bill No. 199* (1960)).

[9] Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 472-73 (1988) (citations omitted).

[10] N.J. STAT. ANN. § 56:8-19 (2007).

[11] Barry v. Arrow Pontiac, Inc., 100 N.J. 57, 69 (1985). *See also*, *Cox*, 138 N.J. at 16;

[12] JuicyCampus.com, About Us, http://www.juicycampus.com/about_us.php (last visited March 20, 2008).

[13] Jessica Bennett, *What You Don't Know Can Hurt You*, NEWSWEEK, Dec. 17, 2007, *available at* http://www.newsweek.com/id/74322.

> Like anything that is even remotely controversial, there are always people who demand censorship. However, we believe that JuicyCampus can have a really positive impact on college campuses, as a place for both entertainment and free expression. Frankly, we're surprised that any college administration would be against the free exchange of ideas.[15]

Why have some administrators publicly come out against JuicyCampus? Donna Lisker, Associate Dean for Undergraduate Education at Duke University, stated that she "heard from a number of students who were distressed that their names were on [JuicyCampus]," and believed that the website "allows the worst side of students to appear."[16] Defamatory postings have been a significant concern, with some messages "call[ing] out professors by name for having inappropriate relations with students," and other postings "pointing out a student by name, and asking other visitors to speak ill of him or her."[17] Such defamatory postings have upset some student leaders to the extent that they have actually requested their administrations to outright ban the website from campus. Andy Canales, the leader of Pepperdine University's student government, which voted 23-5 in favor of banning JuicyCampus from the university's network,[18] stated that the student government's vote to ban the website "is an expression from our student body that we don't want this junk in our community."[19]

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[14] Julia Erlandson, *Campus Gossip Web Sites Satisfy Curious Students While Bringing Up Legal Issues*, DAILY BRUIN, Feb. 4, 2008.

[15] Justin Pope, *Students Fight Back Against Juicy Web Site*, YORK DISPATCH, Feb. 18, 2008.

[16] Andrew Dunn, *Online Message Board Draws Fire*, HERALD-SUN, Dec. 23, 2007, B1.

[17] *Id.*

[18] Other schools have considered taking similar action. *See, e.g.*, Lien Hoang, *CCSC Debates Possible Ban of Gossip Web Site*, COLUM. SPECTATOR, Mar. 3, 2008, *available at* http://www.columbiaspectator.com/node/29724.

JuicyCampus is not the only website to contain potentially defamatory user-submitted content on its message boards. Why, then, has it generated such strong feelings among administrators and students? Unlike other intermediaries, "JuicyCampus seems designed to shield its users from the threat of libel claims" by not maintaining IP logs that could be subpoenaed and used to identify the author of a defamatory posting.[20] Furthermore, "JuicyCampus . . . goes further by directing posters to free online services that cloak IP addresses," and on its blog "implies that it will rebuff" requests to provide user data for "anything short of a public safety query."[21] But perhaps most significantly, JuicyCampus explicitly "disavows any obligation to those who are maligned on its pages" and "does not remove content" from its message boards.[22]

It is this refusal to remove defamatory and otherwise offensive content that has now resulted in scrutiny from the New Jersey and Connecticut State Attorney Generals' offices. Connecticut Attorney General Richard Blumenthal, who is conducting an investigation of the website, has stated that "JuicyCampus.com is different from other social-networking sites because of its absolute guarantee of anonymity and its refusal to provide information about people who post hateful, slanderous, abusive and offensive speech."[23] But does JuicyCampus's alleged inaction justify liability under state consumer fraud laws? The following section will consider this analysis in the context of the current investigation of JuicyCampus by New Jersey's Attorney General for potential violations of the New Jersey Consumer Fraud Act.

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[19] *Campuses Work to Ban Gossip Web Site: JuicyCampus.com Thrives on Malicious Posts*, GRAND RAPIDS PRESS, Feb. 18, 2008, at A3.

[20] Pope, *supra* note 15.

[21] *Id.*

[22] Marc Fisher, *Dorm Gossip Turns Slimy on the Internet*, WASH. POST, Mar. 2, 2008, at C01 (quoting JuicyCampus.com) [internal citations omitted].

[23] Ken Dixon, *JuicyCampus Gossip Site Targeted*, CONN. POST, Mar. 22, 2008.

III. LIABILITY ANALYSIS

The New Jersey Attorney General and Division of Consumer Affairs's investigations of JuicyCampus are based on potential misrepresentations to JuicyCampus's users and third parties, as well as alleged misrepresentations to JuicyCampus's advertisers. This section shall use the JuicyCampus investigation as a case study to examine a Web 2.0 intermediary's potential liability under the Act and similar statutes.

A. Liability for Misrepresentations to Users and Third Parties

Attorney General Milgram has accused JuicyCampus of engaging in "unconscionable commercial practices" in violation of the Act. The term "unconscionable commercial practice," as mentioned earlier, is not explicitly defined in the statute, and courts have generally interpreted it as liberally as possible in a consumer's favor. New Jersey state courts, however, have largely settled on a common definition of the term. According to the New Jersey judiciary's model jury instructions,

> An "unconscionable commercial practice" is an activity in the public marketplace, which is basically unfair or unjust, which materially departs from standards of good faith, honesty in fact and fair dealing. To be unconscionable, there should be factual dishonesty and a lack of fair dealing.[24]

The New Jersey Attorney General has also accused the website of committing "misrepresentation" under the Act. Like "unconscionable commercial practice," the New Jersey judiciary has defined the term "misrepresentation" in its model jury instructions. According to these instructions,

> A "misrepresentation" is an untrue statement, which is made about a fact which is important or significant to the sale/advertisement, and is communicated to another person to create the possibility that the other person will be misled. A

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[24] http://www.judiciary.state.nj.us/civil/charges/4.43.pdf.

> "misrepresentation" is a statement made to deceive or mislead.[25]

The following subsections will consider whether JuicyCampus may be found liable for "unconscionable commercial practices" or "misrepresentations" under the Act for its content moderation policies and alleged selective enforcement of its terms of service.

1. Section 230 Preempts Liability Under the Act

JuicyCampus, like other Web 2.0 intermediaries,[26] is protected by section 230 of the Communications Decency Act.[27] This statute, passed by Congress in 1996 in response to a New York state court decision that found an Internet service provider vicariously liable as a publisher for defamatory statements written by third parties on its message board,[28] alters the common law by providing Internet intermediaries with an absolute immunity from civil liability for content authored by third parties.[29] In order to preserve the Internet as a vibrant marketplace of ideas, Congress took the additional step of preempting all state or local laws that are inconsistent with section 230.[30]

Section 230, however, goes beyond immunizing message boards like JuicyCampus from liability for the speech of its users. The statute additionally immunizes Internet intermediaries from any civil liability resulting from "any action voluntarily taken in good faith to restrict access to . . . material that the provider . . . considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[31] This additional immunity, colloquially referred to as the statute's "Good Samaritan" provision, also preempts all contradictory state and local laws.[32]

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[25] *Id.* at 6.

[26] In general, "Web 2.0 is characterized by user-created content that is prevalent on social networking sites, blogs, and video sharing sites." Anthony Ciolli, *Joe Camel Meets YouTube: Cigarette Advertising Regulations and User-Generated Marketing*, 39 U. TOL. L. REV. 121, 121 (2007). In other words, "the typical Web 2.0 website specializes in community and allows its users to interact with each other in some way through its service." Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 179 (2008).

[27] 47 U.S.C. § 230 (2006).

[28] *See* Stratton Oakmont, Inc., v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. 1995).

[29] 47 U.S.C. § 230(c)(1) (2006).

[30] The statute states that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3) (2006).

Some may question why it was necessary for Congress to include the "Good Samaritan" immunity provision in the section 230 statute. To illustrate the necessity of the "Good Samaritan" provision, one must simply look to the holding of *Stratton Oakmont, Inc., v. Prodigy Services Co.*,[33] the New York state case that spurred passage of section 230 the following year. Under the common law of defamation, an individual who exercises editorial control over a third party's speech typically becomes a publisher of that speech.[34] In *Stratton*, the court applied this common law principle to determine that Prodigy, an Internet service provider which maintained a moderated message board, was a publisher of a defamatory statement on that board even though Prodigy was not the author of the statement and possessed no knowledge of its defamatory contents.[35] The court reasoned that, because Prodigy advertised to its members and the general public that it moderates the content of its message boards, and "actively utiliz[ed] technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and 'bad taste,'" the court found that Prodigy was "clearly making decisions as to content."[36] Even though Prodigy did not always exercise its editorial discretion to remove offensive or inappropriate messages, the court held that Prodigy "uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards," and therefore Prodigy would be held liable as a publisher of all defamatory statements appearing on the boards.[37]

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[31] 47 U.S.C. § 230(c)(2)(a) (2006).

[32] 47 U.S.C. § 230(e)(3) (2006).

[33] 1995 WL 323710 (N.Y. Sup. Ct. 1995).

[34] *Id.* at 3.

[35] *Id.*

[36] *Id.* at 4.

[37] *Id.*

Though the *Stratton* case was a correct application of the common law as it existed at the time, many social conservatives and others concerned with the proliferation of offensive and inappropriate content on the Internet feared that the decision, if allowed to stand, would lead to many companies operating their message boards and other interactive services as absentee landlords. Republican Congressman Chris Cox, who proposed the "Good Samaritan" provision, argued that his amendment was necessary to "protect [intermediaries] from taking on liability such as occurred in the Prodigy case in New York that they should not face for helping us and for helping us solve [the indecency] problem."[38] In other words, Congressman Cox and others feared that without an explicit "Good Samaritan" immunity provision, intermediaries would have a strong incentive to never exercise editorial control over third party content under any circumstances, and thus increase the risk that children and others would be exposed to offensive or indecent content.

Section 230's "Good Samaritan" provision almost certainly would preempt Attorney General Milgram's potential prosecution of JuicyCampus on the basis that the website purportedly violated New Jersey state law by not honoring its own terms and conditions with respect to its users. Even if the Attorney General's allegations were all assumed true—that JuicyCampus contractually prohibits users from making certain offensive postings as part of its required terms of service, yet does not remove those offensive postings after they are made—JuicyCampus's editorial decision to not remove any offensive messages, or only removing some messages but not others, is not in itself grounds for civil liability under current law. JuicyCampus was never under any legal obligation to ban rude, defamatory, racist, or other speech from its message board yet, in order to potentially reduce the incidence of such speech, informed its users that such speech is prohibited and is subject to deletion. This sort of conduct is exactly the kind of activity the "Good Samaritan" provision is intended to protect and thus, if New Jersey's Attorney General intends to pursue a lawsuit against JuicyCampus on this basis, it will almost certainly be dismissed on section 230 grounds.

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[38] 141 CONG. REC. H8470 (1995).

2. JuicyCampus Has Not Misled its Users or the Public

As discussed in the previous sub-section, section 230's "Good Samaritan" provision would almost certainly immunize JuicyCampus and other Web 2.0 intermediaries from liability under the Act for any decisions pertaining to their editorial control over third party message board postings. But even in the absence of its section 230 immunity, it is not likely that JuicyCampus's editorial policies or business practices would be considered "unconscionable commercial practices" or "misrepresentations" under the Act.

For liability to attach to a business owner for "misrepresentations" or "unconscionable commercial practices" under the Act, some sort of untrue statement or factual dishonestly must be present. According to Attorney General Milgram, JuicyCampus has lied to the public by "tell[ing] the public that . . . offensive content may be removed," and then not providing the public with "tools to report or dispute this material."[39]

But has JuicyCampus actually lied to the public in such a way? The JuicyCampus terms of service does explicitly prohibit users from posting certain types of content, and reads, in pertinent part:

> You agree to not use the Site to:
>
> (a) violate or solicit the violation of any applicable local, state, national or international law;
>
> (b) infringe the rights of any third party, including but not limited to intellectual property rights and privacy or publicity rights;
>
> (c) upload, post, email or otherwise transmit any Content that:
>
>> (1) is unlawful, threatening, abusive, tortious, defamatory, obscene, libelous, or invasive of another's privacy;

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[39] Office of the Att'y Gen,, *supra* note 1.

> > (2) consists of instructional information on illegal activities, including, but not limited to, hacking, cracking, and breaking;
> >
> > (3) violates or infringes in any way upon the proprietary rights of others, including, without limitation, copyrighted software, music, photographs, text, videos or artwork;
> >
> > (4) constitutes pornography, or sexual material of an obscene nature or that violates local, state or national laws;
> >
> > (5) is the private information of another such as their addresses, phone number, Social Security number or credit card number;
> >
> > (6) contains software viruses, Trojan horses or any other computer code, files or programs designed to interrupt, destroy or limit the functionality of any computer software or hardware or telecommunications equipment; or
> >
> > (7) you do not have a right to upload or post due to contractual or other legal obligation.
>
> (d) impersonate any person or entity, including, but not limited to, a JuicyCampus employee, forum leader, guide or host, or falsely state or otherwise misrepresent your affiliation with a person or entity;
>
> (e) forge headers or otherwise manipulate identifiers in order to disguise the origin of any Content transmitted through the Site;
>
> (f) interfere with or disrupt the Site, computer servers or boards accessible through the Site; and
>
> (g) disseminate off-topic messages on boards promoting any product, service, web site, board or venture, or promote boards on the Site through unsolicited electronic mail messages to third parties.[40]

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[40] JuicyCampus, Terms & Conditions, http://www.juicycampus.com/terms_and_conditions.php (last visited Mar. 23, 2008).

However, the JuicyCampus terms of service also explains the website's enforcement mechanism for violations of its content policies:

> If you use the Site to commit any of the above offenses, JuicyCampus may, at its sole discretion. terminate your password, account (or any part of it) or ability to use the Site, and remove any Content you posted to the Site. If you violate any laws, JuicyCampus may report you to applicable authorities. JuicyCampus will respond to lawful subpoenas.[41]

JuicyCampus furthermore states in its terms of service that it does not pre-screen any user-submitted content:

> You acknowledge that JuicyCampus does not pre-screen Content, but agree that JuicyCampus shall have the right (but not the obligation) to access, re-arrange, modify and remove or restrict access to any Content on the Site in its sole discretion and without notice or compensation. Without limiting the foregoing, JuicyCampus shall have the right to access and remove or restrict access to any Content that violates this Agreement or that JuicyCampus believes is otherwise objectionable, in its sole discretion.[42]

As Sam Bayard correctly observes, "it's hard to see how [the JuicyCampus terms of service] is a representation on the part of the website about, well, *anything*."[43] While JuicyCampus does, in no uncertain terms, ban defamatory speech, it also makes it clear that enforcement is in JuicyCampus's "sole discretion," and that while it retains the right to enforce its terms of service, it is not in any way obligated to do so. Given these facts, it is difficult to see how JuicyCampus may have engaged in misrepresentations or unconscionable commercial practices under the Act with regard to its users.

Furthermore, it is unclear how JuicyCampus has failed in its purported obligation to provide the public with the tools necessary to report or dispute allegedly defamatory content. Once again, JuicyCampus has not made any representations to the public, through its terms of service or otherwise, that it will make such tools available. However, contrary to Attorney General Milgram's assertions, JuicyCampus has made such tools available. On its frequently asked questions page, JuicyCampus instructs users on what they should do if they encounter a comment on its message board that is not true:

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[41] *Id.*

[42] *Id.*

[43] Posting of Sam Bayard to Citizen Media Law Project Blog, New Jersey Prosecutors Set Sights on JuicyCampus, Mar. 21, 2008, http://www.citmedialaw.org/blog/2008/new-jersey-prosecutors-set-sights-juicycampus.

> What if I see a comment that just isn't true?
>
> First, you might want to consider whether the comment states a fact or an opinion. Facts can be untrue. Opinions can be stupid, or ignorant, or mean-spirited, but they can't be untrue. And we believe everyone is entitled to their opinion.
>
> Second, if the comment states a fact, rather than an opinion, consider whether there is any possibility that the fact is true. What is the source? Why do you believe it to be incorrect? Is this something about which you have personal knowledge? Sometimes people surprise you.
>
> Third, consider whether the "fact" is meant to be taken as truthful, considering the context. If the "fact" is that Jerry Falwell had sex with his mother in an outhouse, that's obviously meant to be a joke. Parody is protected by the First Amendment.
>
> If you still think the comment is factually false, you should probably give it a big thumbs down down [sic] to start so that people know you disagree. And you can also reply with your thoughts on the subject and additional information – maybe even something that disproves it.
>
> Finally, remember that you are reading a web site run by people you don't know, containing comments made by people you don't know, concerning events which may or may not have occurred. You should take everything you read with a large grain of salt.[44]

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[44] JuicyCampus, Frequently Asked Questions, http://www.juicycampus.com/faqs.php (last visited Mar. 23, 2008).

In other words, JuicyCampus clearly recommends that individuals who encounter potentially untrue statements first consider the possibility that the statement is actually true or an opinion or parody and, then, if still believed to be false, use the message board itself as the mechanism for disputing the accuracy of the content. Additionally, JuicyCampus provides its contact information, and invites individuals to send electronic or postal mail if they have any feedback or questions.[45]

To summarize, based on the information available, it is highly unlikely that JuicyCampus has violated the Act with respect to any alleged misrepresentations to its users. JuicyCampus has not given its users the impression that it has assumed a duty to prescreen or otherwise moderate postings on its message board, since it has explicitly stated multiple times on its website, including in its terms of service, that it always retains the sole discretion to remove or alter content and is under no obligation to actually enforce its terms of service. Contrary to Attorney General Milgram's assertions, JuicyCampus has also told individuals that the appropriate mechanism for responding to factually untrue statements is to use the JuicyCampus message board to explain that the earlier statement is untrue. Finally—and most importantly—any action against JuicyCampus under the Act is preempted under the "Good Samaritan" provision of section 230 of the Communications Decency Act, thus preventing JuicyCampus from being held liable for any violations of the Act with respect to potential misrepresentations to its users regarding its content moderation policies even if it has acted wrongly.

B. Liability for Misrepresentations to Advertising Networks

In addition to the allegations that JuicyCampus has misled its users and third parties, Attorney General Milgram has accused the website of misrepresenting itself to Google AdSense, AdBrite, and potentially other online advertising networks.[46] Though the Attorney General and the Division of Consumer Affairs have not elaborated on this potential cause of action in their statements to the media, it is likely that section 230 would not shield JuicyCampus from liability for misrepresentations made to these advertising agencies.

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[45] JuicyCampus, Contact Us, http://www.juicycampus.com/contact_us.php (last visited Mar. 23, 2008).

[46] Office of the Att'y Gen., *supra* note 1.

1. Why Liability May Attach

Online advertising networks, such as AdBrite and Google AdSense, allow website owners to easily monetize their properties without having to go through the trouble of soliciting advertisers themselves. Such networks essentially serve as intermediaries between websites and those who wish to advertise on the Internet: website owners apply for representation and, if their applications are approved, the networks will automatically begin to serve advertisements on those websites that will typically vary based on each website's content.[47] In exchange for acting as an intermediary between advertisers and website owners, the advertising network will receive a commission, believed to be in the range of forty to sixty percent.[48]

But not all websites are eligible for such representation. Like their offline counterparts, online advertising agencies will only agree to represent publishers that meet their required terms and conditions. Each advertising network has its own terms and conditions, and policies may differ significantly from one network to another. For example, while large networks such as Google AdSense typically have no minimum traffic requirement for representation, smaller networks will often only represent websites that exceed a certain minimum number of monthly page views.[49]

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[47] For more information on the AdSense and AdBrite programs, see Google AdSense, http://www.google.com/adsense (last visited Mar. 22, 2008); AdBrite, How AdBrite Works, http://www.AdBrite.com/mb/howitworks.php (last visited Mar. 22, 2008).

[48] Though advertising networks, including AdSense, often do not release their precise commission—perhaps because they vary—some search engine marketing specialists speculate that the commission is in this range. *See, e.g.*, Chris Beasley, *Introducing Google AdSense*, SITEPOINT, June 25, 2003, http://www.sitepoint.com/article/introducing-google-adsense.

[49] For instance, Global Interactive, a relatively small online advertising network, requires that all websites it represents "[h]ave a minimum of 3,000 impressions per month, and an active user base." Global Interactive, Site Requirements,

Though advertising networks may differ as to some requirements, virtually all networks exclude certain types of websites from representation based on their content. Google AdSense, for instance, prohibits websites from displaying its ads on websites with the following types of content:

- Pornography, adult or mature content
- Violent content
- Content related to racial intolerance or advocacy against any individual, group or organization
- Excessive profanity
- Hacking/cracking content
- Gambling or casino-related content
- Illicit drugs and drug paraphernalia content
- Sales of beer or hard alcohol
- Sales of tobacco or tobacco-related products
- Sales of prescription drugs
- Sales of weapons or ammunition (e.g. firearms, firearm components, fighting knives, stun guns)
- Sales of products that are replicas or imitations of designer goods
- Sales or distribution of coursework or student essays
- Content regarding programs which compensate users for clicking ads or offers, performing searches, surfing websites or reading emails
- Any other content that is illegal, promotes illegal activity or infringes on the legal rights of others.[50]

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http://www.globalinteractive.com/publishers_ site_requirements.html (last visited Mar. 22, 2008).

[50] Google AdSense, Google AdSense Program Policies, https://www.google.com/adsense/support/bin/answer.py?answer=48182&sourceid=aso&subid=ww-ww-et-

AdBrite prohibits similar websites as AdSense, explicitly banning:

> - Any pornographic material, adult material, or mature content including thinly censored nudity. Due to the risk of adult content, we do not allow image hosts or free web hosting services.
>
> - Any offers for illegal activities, products or services.
>
> - Promotion of fake documents, copied material, or paper mills.
>
> - Promotion of drugs, or any related paraphernalia.
>
> - Promotion of excessive profanity or violence
>
> - Promotion of discrimination or infringes on the legal rights of others.
>
> - Promotion or any attempt to profit from human tragedy or suffering that lacks any social, artistic, or political value. This includes any content that may be deemed inappropriate or insensitive to victims of natural disasters or human tragedies.
>
> - Promotion of incentives for users or third-party beneficiaries for online activities, but not limited to, completing offers, performing searches, surfing websites, reading emails, completing surveys, clicking on ads, or any activity that artificially enhances website/advertiser metrics.
>
> - Promotion of illegitimate programs and offers, such as ponzi schemes or high yield investments.
>
> - Content or site construction intended to deceive or mislead for purposes of increasing traffic or clicks.
>
> - Sales or offers that contain certain weapons, alcohol, tobacco, or any related paraphernalia.
>
> - User submitted content that is not moderated.
>
> - Little or no original content. This includes, but is not limited to:

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asui&medium=link (follow "View full content guidelines" hyperlink under "Content Guidelines") (last visited Apr. 15, 2010).

> o**Scraped content:** Sites with content taken from high-quality sources or "Free Article" sites. These are often template or cookie cutter sites.
>
> o**Auto-generated content:** Sites with programmatically generated content. These sites often have random content that is confusing or nonsensical to a site visitor.
>
> o**Doorway sites:** Sites with content designed to increase search engine rank, with little content for an actual site visitor.
>
> o**Made for ad sites:** Sites that primarily consists of only advertisements do not constitute content for a landing page.
>
> o**Login to view any content:** Sites with landing pages with only a login or registration form.
>
> o**Thin affiliate sites:** These sites collect pay-per-click (PPC) revenue by sending visitors to the sites of affiliate programs, while providing little or no value-added content or service to the user. These sites usually have no original content and may be cookie-cutter sites or templates with no unique content.
>
> o**Site under construction:** Sites that are blank, under construction, page with raw coding/incorrect coding, or take too long respond.[51]

Before submitting an application requesting representation, website owners are required to certify to both AdBrite and Google AdSense that they have read their respective program policies and agree to adhere to those terms.[52]

As mentioned in Attorney General Milgram's press release announcing the investigation, JuicyCampus was once a participant in both the AdBrite and AdSense programs, and her office has sent a subpoena to AdBrite "requesting information about the business relationship between AdBrite and JuicyCampus.com in order to determine how JuicyCampus.com represented its operation to AdBrite."[53] In addition, the Attorney General has sent a letter to Google AdSense "inquir[ing] about the company's prior business relationship with JuicyCampus.com."[54]

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[51] AdBrite, Publisher Acceptable Use Policy, http://help.AdBrite.com/index.php?action=artikel &cat=2&id=208&artlang=en (last visited Apr. 15, 2010).

[52] *See* AdBrite, Website Owners: Sign Up to Earn Money, https://www.AdBrite.com/mb /publisher_landing_page.php (last visited Mar. 23, 2008); Google AdSense, Welcome to AdSense, https://www.google.com/adsense/g-app-single-1 (last visited Mar. 23, 2008).

Given these facts, there is a good possibility that New Jersey's Attorney General could establish a prima facie case against JuicyCampus under the state's consumer fraud statute. Provided that JuicyCampus represented itself as being in compliance with AdBrite and AdSense's program policies, yet was aware that it had not been in compliance, one could argue that JuicyCampus engaged in misrepresentation, intentionally misleading the advertising networks as to the site's content in order to enter into a business relationship with them that would not have occurred otherwise.

2. JuicyCampus's Potential Defenses

But while Attorney General Milgram may be able to establish a prima facie case of misrepresentation against JuicyCampus and prosecute the website's owners, there is no guarantee that liability will actually attach.

Perhaps one of the strongest defenses available to JuicyCampus is that its alleged misrepresentation was not material to the transaction, since AdBrite and AdSense assented to JuicyCampus's content. Both AdBrite and AdSense pre-screen all applications for their respective programs to ensure that the websites that will display their ads are in compliance with their program policies. The website approval process is not merely a technical formality—AdSense, for instance, has rejected such a large number of websites during the application process that it has created a "Before You Apply to AdSense" page that discusses "a few common pitfalls" that webmasters should avoid in order to make sure that their applications are approved the first time around.[55]

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[53] Office of the Att'y Gen., *supra* note 1.

[54] *Id.*

Since both advertising networks pre-screen all applications to ensure compliance with their program policies *before* ads are allowed to appear on those websites, one can assume—provided that AdSense and AdBrite followed their own stated policies—that agents of both networks were aware of the content on the JuicyCampus website, yet decided to accept JuicyCampus's application anyway. By accepting JuicyCampus's application after a site review—which, given the design of the JuicyCampus website, would have surely uncovered the website's content—AdSense and AdBrite demonstrated that either they agreed that JuicyCampus was in compliance with their policies (in which case JuicyCampus did not misrepresent itself) or felt that any misrepresentations JuicyCampus made about its content were immaterial to the transaction (which would preclude liability under the Act even if JuicyCampus had misrepresented the content of its message boards). In any event, the site review aspect of the AdSense/AdBrite application process provides JuicyCampus with a strong defense against any claim that it has violated the Act.

3. Policy Considerations

As the above subsection demonstrates, it remains an open question as to whether JuicyCampus can be found liable under a state consumer fraud statute for alleged misrepresentations made to its advertising agencies. However, even if JuicyCampus's potential defenses did not apply or were not persuasive, public policy considerations work against applying the statute to the website. Perhaps the strongest policy argument against holding an Internet intermediary liable for purported misrepresentations to Internet advertising agencies is that in such situations neither the agencies nor advertisers have actually suffered any damages nor has the intermediary received a windfall.[56] It is well established that public policy strongly disfavors allowing a party to recover damages for alleged fraud when no party has actually suffered damages as a result of the fraud.[57] Given this context, it is unclear how allowing New Jersey to pursue JuicyCampus or another intermediary under such a theory could be justified.

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[55] Google AdSense Blog, Before You Apply to AdSense, http://adsense.blogspot.com/2007/09/before-you-apply-to-adsense.html (Sept. 25, 2007, 10:35 AM PDT).

[56] *See* SearchEngineWatch.com, AdSense Publisher Sues Google – And Wins, Mar. 6, 2009, http://blog.searchenginewatch.com/090306-120235 (explaining AdSense's prac-

IV. CONCLUDING REMARKS

To the extent New Jersey or any other state wishes to pursue an Internet intermediary under a consumer fraud statute on the basis of purported misrepresentations the intermediary has made to its users or to the general public regarding its content moderation policies, such an action is clearly and unambiguously preempted under section 230 of the Communications Decency Act. However, to the extent the State grounds its action on misrepresentations to advertising networks, liability may attach to the intermediary despite section 230. Nevertheless, given the review processes employed by these advertising networks, as well as public policy considerations, it is unlikely that such actions, even if not preempted, will or should succeed.

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tice of withholding funds when an account is terminated and refunding those funds to advertisers).

[57] *See, e.g.,* Orient Handel v. United States Fid. & Guar. Co., 237 Cal. Rptr. 667, 696 (Cal. Ct. App. 1987) (holding that insurer may not recover for insured's purported fraud when insurer did not suffer any damages).

EMPLOYEE FIDUCIARY DUTIES: ONE SIZE DOES NOT FIT ALL

*Leslie Larkin Cooney**

This article examines the law surrounding the fiduciary duties owed by non-officer employees to their employers and the remedies imposed for a breach of those duties. It is the author's contention that applying the same agency principles to all employees regardless of their level of power or ability to exercise discretion or affect the employer's interests generates an uncalled for advantage to the employer.[1]

Employment law in the United States has evolved from the English law of master and servant, and agency is defined as the fiduciary relationship arising when a principal manifests assent to an agent that the agent will act subject to the principal's control, on the principal's behalf and the agent consents to act.[2] While agency encompasses a range of circumstances and relationships, the Restatement of Agency (Third) indicates its elements are present in the employer-employee relationship.[3] "The common law of agency, however, additionally encompasses the employment relation, even as to employees whom an employer has not designated to contract on its behalf or otherwise to inte-

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[1] This premise applies only to non-officer employees. Officers and other employees occupying positions of confidence and trust should be subject to the broad application of agency's fiduciary duties and applicable remedies for breach.

[2] RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006). "Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *Id. See* Walton v. United States, 80 Fed. Cl. 251, 273–74 (Fed. Cl. 2008).

[3] RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (2006); Deborah A. DeMott, *Disloyal Agents*, 58 ALA. L. REV. 1049, 1051 (2007). "Thus, agents for purposes of common law agency include lawyers, real estate brokers, stock brokers, officers of legal entities of all sorts, and employees." *Id. See* Eckard Brandes, Inc. v. Riley, 338 F.3d 1082, 1085 (9th Cir. 2003); Judah v. Reiner, 744 A.2d 1037, 1039–40 & n.5 (D.C. 2000). *But see* Haas v. Caster, 66 N.W. 2d 878, 880 (Iowa 1954) (noting that an employee is not always an agent for the employer); Iowa Power & Light Co. v. Abild Constr. Co., 144 N.W.2d 303, 315 (Iowa 1966) (stating there is a very fine line between agent and employee).

ract with parties external to the employer's organization."[4] Since agency is a fiduciary relationship, if employees are agents,[5] then all employees have a fiduciary relationship with their employer.[6] As agents of the employers, all employees owe broad fiduciary duties to their employers.[7] The scope of the duties defined by this relationship is outlined in the Restatement of Agency (Third).

The Restatement of Agency (Third) expresses a general fiduciary standard and separates an agent's duties into duties of loyalty and duties of performance.[8] This general fiduciary standard requires an employee to act loyally for the employer's benefit in all matters connected with the relationship.[9] An agent's specific duties of loyalty restrict an employee from acquiring any material benefit from a third party in connection with transactions conducted or other actions taken on behalf of the employer or otherwise through the use of the employee's position[10] and restricts the employee from dealing as an adverse party or on behalf of one in any transaction connected with the employment.[11] The Restatement of Agency (Third) also obliges employees to refrain from competing with the employer and from acting for or assisting competitors.[12] If, for the employee's own purposes or the purposes of a third party, an employee uses the employer's property or communicates confidential information, the employee violates an agent's duty of loyalty.[13] An employer may consent to conduct that would otherwise be disloyal, but an employee must act in good faith in obtaining this consent, must disclose all material facts and must otherwise deal fairly with the employer.[14] An employee may take actions dur-

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[4] RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (2006).

[5] Nationwide Mut. Ins. Co., v. Darden, 503 U.S. 318, 322-23 (1992); *See* Richard J. Hunter, Jr., *An "Insiders" Guide to the Legal Liability of Sports Contest Officials,* 15 MARQ. SPORTS L. REV. 369, 398 (2005).

[6] H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 165–66 (1877) (*reprinted in* R.H. HELMHOLZ, BERNARD D. REAMS, JR., HISTORICAL WRITINGS IN LAW AND JURISPRUDENCE 18 (W.S. Hein 1981)). Wood's Treatise states:

> On the part of the servant, there is an implied obligation to enter the master's service and serve him diligently and faithfully, to obey all his reasonable commands, treat him respectfully, conduct himself morally in his master's family, and to perform the duties incident to his employment honestly, with ordinary care, and due regard to his master's interest and business.

Id. at 166.

[7] Konrad Lee, *Anti-Employer Blogging: Employee Breach of the Duty of Loyalty and the Procedure for Allowing Discovery of a Blogger's Identity Before Service of Process Is Effected*, 2006 DUKE L. & TECH REV. 2, 11 (2006).

[8] RESTATEMENT (THIRD) OF AGENCY §§ 8.01–8.12 (2006). *See* Abetter Trucking Co. v. Arizpe, 113 S.W.3d 503, 510 (Tex. Ct. App. 2003).

[9] RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006). "An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship." *Id.* The duty of loyalty derives from the basic obligation of faithful service found in English master and servant law and has been a part of our earliest common law. William Lynch Schaller, *Jumping Ship: Legal Issues Relating to Employee Mobility in High Technology Industries*, 17 LAB. LAW. 25, 31 (2001) (citing Robert J. Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture*, 13-50-1870, at 169 (1991)). *See* Ray Mart Inc. v. Stock Bldg. Supply of Tex. LP, No. 07-50609, 2008 WL 4809471, at *6 (5th Cir. Nov. 5, 2008); Nat'l R.R. Passenger Corp. v. Veolia Transp. Servs., Inc., 592 F. Supp. 2d 86, 95 (D.D.C. 2009).

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[10] RESTATEMENT (THIRD) OF AGENCY § 8.02 (2006). "An agent has a duty not to acquire a material benefit from a third party in connection with transactions conducted or other actions taken on behalf of the principal or otherwise through the agent's use of the agent's position." *Id. See Abetter*, 113 S.W.3d at 510; Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 200 (Tex. 2002).

[11] RESTATEMENT (THIRD) OF AGENCY § 8.03 (2006). "An agent has a duty not to deal with the principal as or on behalf of an adverse party in a transaction connected with the agency relationship." *Id. See Abetter*, 113 S.W.3d at 510; *Johnson*, 73 S.W.3d at 200; Television Events & Mktg. Inc. v. Amcon Distrib. Co., 526 F. Supp. 2d 1118, 1126–28 (D. Haw. 2007).

[12] RESTATEMENT (THIRD) OF AGENCY § 8.04 (2006). "Throughout the duration of the an agency relationship, an agent has a duty to refrain from competing with the principal and from taking action on behalf of or otherwise assisting the principal's competitors." *Id.* "During that time, an agent may take action, not otherwise wrongful, to prepare for competition following termination of the agency relationship." *Id. See* Rash v. J.V. Intermediate, Ltd., 498 F.3d 1201, 1209–10 (10th Cir. 2007) (stating that an employee's failure to disclose his ownership stake in a subcontractor company hired by the principal resulted in the violation of the employee's fiduciary duty).

[13] RESTATEMENT (THIRD) OF AGENCY § 8.05 (2006). "An agent has a duty (1) not to use property of the principal for the agent's own purposes or those of a third party; and, (2) not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party." *Id. See* Synergetics, Inc. v. Hurst, 477 F.3d 949, 959 (8th Cir. 2007) (stating that a former employees' use of confidential trade secret information to design competitive products violated their duty of loyalty to their former employers).

[14] RESTATEMENT (THIRD) OF AGENCY § 8.06 (2006).

> (1) Conduct by an agent that would otherwise constitute a breach of duty as stated in §§ 8.01, 8.02, 8.03, 8.04, and 8.05 does not constitute a breach of duty if the principal consents to the conduct, provided that
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> (a) in obtaining the principal's consent, the agent
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> (i) acts in good faith,
>
> (ii) discloses all material facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment unless the principal has manifested that such facts are al-

ing employment to prepare for competition after termination of employment, provided such activity is not otherwise wrongful.[15] An employee who acts for more than one employer in a transaction between employers has a duty to act in good faith and deal fairly with each employer, disclosing to each that the employee works for the other as well as all other facts that would reasonably affect either employer.[16]

An agent's duties of performance require an employee to comply with the express and implied terms of any employment contract,[17] comply with all lawful instructions,[18] and act with

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ready known by the principal or that the principal does not wish to know them, and

(iii) otherwise deals fairly with the principal; and

(b) the principal's consent concerns either a specific act or transaction, or acts or transactions of a specified type that could reasonably be expected to occur in the ordinary course of the agency relationship.

(2) An agent who acts for more than one principal in a transaction between or among them has a duty

(a) to deal in good faith with each principal,

(b) to disclose to each principal

(i) the fact that the agent acts for the other principal or principals, and

(ii) all other facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and

(c) otherwise to deal fairly with each principal.

Id. See United Teachers Assocs., Ins. Co. v. MacKeen & Bailey Inc., 99 F.3d 645, 650 (5th Cir. 1996) (holding that an actuary giving advice, with permission, to a competing insurance company during negotiations of a purchase of that particular company, which resulted in the failure of negotiations, violated the actuaries fiduciary duty to the insurance company with which he was contracted).

[15] RESTATEMENT (THIRD) OF AGENCY § 8.04 (2006). *See* Kopka, Landau & Pinkus v. Hansen, 874 N.E.2d 1065, 1071–72 (Ind. Ct. App. 2007) (stating that an attorney planning to leave his firm did not breach his fiduciary duty by questioning other employees about their desire, if any, to leave the firm and work for his new firm in the future); Nat'l Rejectors, Inc. v. Trieman, 409 S.W.2d 1, 26–28 (Mo. 1966) (stating that employees who organized, planned and incorporated a new competing company while still employed did not breach their fiduciary duties).

[16] RESTATEMENT (THIRD) OF AGENCY § 8.06 (2006). *See* Television Events & Mktg., Inc. v. Amcon Distrib. Co., 526 F. Supp. 2d 1118, 1133–34 (D. Haw. 2007).

[17] RESTATEMENT (THIRD) OF AGENCY § 8.07 (2006). "An agent has a duty to act in accordance with the express and implied terms of any contract between the agent and the principal." *Id. See* Hendricks Prop. Mgmt. Corp. v. Birchwood Props. Ltd. P'ship, 741 N.W.2d 461, 465–66 (N.D. 2007).

the care, competence and diligence exercised by employees similarly situated.[19] The employee must act reasonably and avoid actions likely to damage the employer[20] and must act only within the scope of the employee's actual authority.[21] The employee has the duty to provide information material to the employment and its functions.[22] Duties of performance relate objectively to each employee's specific obligations and provide standards specific to that particular employment relationship. For example, although the overarching duties of performance are the same whether the employee is an entry-level stock clerk, a mid-level

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[18] RESTATEMENT (THIRD) OF AGENCY § 8.09(2) (2006). "An agent has a duty to comply with all lawful instructions received from the principal and persons designated by the principal concerning the agent's actions on behalf of the principal." *Id. See* Appleby v. Kewanee Oil Co., 279 F.2d 334, (10th Cir. 1960) (reaffirming that an agent must obey any lawful instructions given by the principal).

[19] RESTATEMENT (THIRD) OF AGENCY § 8.08 (2006).

> Subject to any agreement with the principal, an agent has a duty to the principal to act with the care, competence, and diligence normally exercised by agents in similar circumstances. Special skills or knowledge possessed by an agent are circumstances to be taken into account in determining whether the agent acted with due care and diligence. If an agent claims to possess special skills or knowledge, the agent has a duty to the principal to act with the care, competence, and diligence normally exercised by agents with such skills or knowledge.

Id. See Carrier v. McLlarky, 693 A.2d 76, 78 (N.H. 1997) ("Agents have a duty to conduct the affairs of the principal with a certain level of diligence, skill, and competence.").

[20] RESTATEMENT (THIRD) OF AGENCY § 8.10 (2006). "An agent has a duty, within the scope of the agency relationship, to act reasonably and to refrain from conduct that is likely to damage the principal's enterprise." *Id. See* McGarry v. Saint Anthony of Padua Roman Catholic Church, 704 A.2d 1353, 1357–58 (N.J. Super. Ct. App. Div. 1998) (stating that even if an agent's actions are satisfactory, an agent's conduct that sheds improper light or can damage the principal breaches an agent's fiduciary duty).

[21] RESTATEMENT (THIRD) OF AGENCY § 8.09(1) (2006). "An agent has a duty to take action only within the scope of the agent's actual authority." *Id. See* Baranksi v. Fifteen Unknown Agents of ATF, 195 F. Supp. 2d 862, 866 (W.D. Ky. 2002) (noting that executing and serving search warrants is within the scope of duty for ATF agents).

[22] RESTATEMENT (THIRD) OF AGENCY § 8.11 (2006).

> An agent has a duty to use reasonable effort to provide the principal with facts that the agents knows, has reason to know, or should know when
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> > (1) subject to any manifestation by the principal, the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent's duties to the principal; and
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> > (2) the facts can be provided to the principal without violating a superior duty owed by the agent to another person.

Id. See United States v. Stein, 463 F. Supp. 2d 459, 461–62 (S.D.N.Y. 2006); Sotheby's Int'l Realty, Inc. v. Black, 472 F. Supp. 2d 481, 486–87 (S.D.N.Y. 2006).

sales manager, or an upper-level executive vice president, it is easy to distinguish among the requirements which would satisfy the fulfillment of such duties at each level, and it is obvious that the requirements become more onerous as the levels of employment rise.[23] This is not so easily distinguishable or obvious when one looks at employees' fiduciary duties of loyalty that serve functions distinct from those of performance.[24] Nonetheless, disloyalty by employees is likely to fall into two basic categories: the first stemming from a conflict between the employer's interests and those of the employee, and the second stemming from conflicting interests from multiple or successive employers.[25] The majority of cases involving alleged breaches of the duty of loyalty by employees fall into the first category due to the sheer fact that most employees will be acting for only one employer[26]—unlike other non-employee agents who more often work for multiple principals. Of course, as the American workforce becomes more mobile, and this mobility is likely to grow during today's recessionary times, the amount of breaches of employee loyalty arising from conflicting interests from multiple employers will most certainly increase.[27] Moreover, the reach of the duty encompasses any employee conduct that is inconsistent with the employer's interests and, therefore, it arguably extends to harmful speech,[28] insubordination,[29] neglect,[30] disruption of employee/employer relations,[31] or discrediting the employer's name,[32] product[33] or reputation.[34]

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[23] Interestingly, although at-will employment does not bind an employee to performance, the duty of loyalty has been found to attach once performance begins. *See* Condon Auto Sales & Serv., Inc. v. Crick, 604 N.W.2d 587, 599 (Iowa 1999).

[24] DeMott, *supra* note 3, at 1057–58 (generalizing that the duty of loyalty acts as "an exclusively subsidiary function" in that, regardless of the agent's completion of other duties, the agent's actions can still be scrutinized as to their loyalty throughout the process of completing those duties). *See* Bee Load Ltd. v. British Broad., No. CV03-417, 2005 WL 3338923, at *2 (Me. Super. Ct. Sept. 20, 2005) (noting that "the duty of loyalty and the duty of care are distinct elements found in a fiduciary relationship"); Meyers v. Sudfeld, No. Civ. A.05-2970, 2006 WL 401855, at *6 (E.D. Pa. Feb. 21, 2006) (stating that "a claim of breach of the fiduciary duty of loyalty represents a distinct cause of action . . . which implicates a duty of care").

[25] DeMott, *supra* note 3, at 1054 (citing Matthew Conaglen, *The Nature and Function of Fiduciary Loyalty*, 121 L.Q.R. 452, 465 (2005)).

[26] Fatland v. Quaker State Corp., 62 F.3d 1070 (8th Cir. 1995).

[27] *See generally* Jill Rubery, Jill Earnshaw & Mick Marchington, *Blurring the Boundaries to the Employment Relationship: From Single to Multi-Employer Relationships*, *in* FRAGMENTING WORK: BLURRING ORGANIZATIONAL BOUNDARIES AND DISORDERING HIERARCHIES at 64 (Mick Marchington et al. eds., Oxford: Oxford University Press, 2005) ("Where employees of one organization work in environments open to pressure and influence from other employers, the relevance of key notions of . . . loyalty . . . are called into question."). *See also* Alfred W. Blumrosen & Ruth G. Blumrosen, *First Statistical Report on Intentional Job Discrimination Against Women*, 25 WOMEN'S RTS. L. REP. 63, 69 (2003) ("[I]n the present era, where job security is no longer so common

Courts sometimes indicate that the employee accused of breaching his or her fiduciary duties was an officer, executive, or manager and the use of such facts would seem to attach some

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and employee "loyalty" has been undermined by changes in the employment relationship, an increasing proportion of employees are likely to be mobile."). *But see*, Yuval Feldman, *Experimental Approach to the Study of Normative Failures: Divulging of Trade Secrets by Silicon Valley Employees*, 2003 U. ILL. J.L. TECH. & POL'Y. 105, 119 (2003) (positing employers in the Silicon Valley accept employee disclosure of trade secrets and do not sue former employers because the employers remember how they began their own careers).

[28] When one is fired because of information appearing on one's website or in a blog, the employee has been "dooced." Laura DiBiase, *To Blog or Not to Blog?*, AM. BANKR. INST. J., Nov. 24, 2005, at 32. Some states have enacted legislation making it harder for employees to be terminated for off-duty conduct. *See* COLO. REV. STAT. ANN. § 24-34-402.5 (West 1990) (prohibiting an employer from terminating "any employee due to that employee's engaging in any lawful activity off the premises of the employer during non-working hours"); N.Y. LAB. LAW § 201-d(2)(c) (McKinney 2003) (prohibiting employer discipline or termination for an employee's "legal recreational activities outside work hours"); N.D. CENT. CODE § 14-02.4-03 (2005) (prohibiting discrimination based on an employee's lawful off-duty activities). *See* Aaron Kirkland, *"You Got Fired? On Your Day Off?!": Challenging Termination of Employees for Personal Blogging Practices*, 75 UMKC L. REV. 545 (2006) (calling for a federal approach to protect off-duty activities which are unrelated to job performance).

[29] Grigsby v. Kane, 250 F. Supp. 2d 453, 455 (M.D. Pa. 2003) (finding two former attorneys for Pennsylvania's Bureau of Professional Licensing and Occupational Affairs were properly terminated for speaking out against a new quota system used to determine "which healthcare professionals should be prosecuted for violating the law").

[30] Long v. Ohio Dep't of Job & Family Servs., 907 N.E.2d 373, 381 (Ohio Ct. App. 2009) (stating that standards of employee conduct for employees of the Dep't are violated by "incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of public, neglect of duty, acts of misfeasance or nonfeasance").

[31] *See generally* Alberti v. County of Nassau, 393 F. Supp. 2d 151 (E.D.N.Y. 2005) (finding an employee's political affiliation may lead to disruption of employee/employer relations when the employment concerns policymaking and political connections).

[32] Curran v. Cousins, 509 F.3d 36 (1st Cir. 2007) (holding an employee can violate his/her duty by discrediting the employer's name through posting messages on an internet blog).

[33] Marsh v. Delta Air Lines, Inc., 952 F. Supp. 1458 (D. Colo. 1997) (finding an airline employee violated a duty not to discredit an employer's product by sending a letter to a newspaper criticizing the airline).

[34] Tory A. Weigand, *Employee Duty of Loyalty and the Doctrine of Forfeiture*, 42 BOSTON BAR J. 6, 7 (Sept./Oct. 1998).

importance to the level of an employee's position when adjudicating fiduciary duties.[35] For example, when applying Illinois law, a federal district court pointed to the fact that the employee was highly paid, had access to the employer's confidential information such as customer lists, and had authority to place orders and sell and distribute products before concluding that the employee was liable for a breach of a fiduciary duty.[36] Conversely, the court in *Dalton v. Camp*[37] did not discuss whether a former manager owed the fiduciary duties of an agent to his employer and whether the alleged conduct formed a basis for a breach of fiduciary duties.[38] Instead, the court implicitly established the presumption that a fiduciary relationship *does not exist* between employer and employee.[39] The court further clarified that it did not sanction an independent action for breach of duty of loyalty and stated that the manager's disloyalty was only relevant as part of the employer's defense in an action for wrongful termination.[40]

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[35] *E.g.*, Beverly Hills Concepts, Inc. v. Schatz & Schatz, 717 A. 2d 724, 730 (Conn. 1998) (holding that, unlike the firm's partner, the junior associate did not have the special trust with the client to conclude that there is a fiduciary duty); Sun Life Assurance Co. of Can. v. Coury, 838 F. Supp. 586 (S.D. Fla. 1993); Pride Mobility Prods. Corp. v. Dylewski, No. 3:08-cv-0231, 2009 WL 249356, at *18 (M.D. Pa. 2009) ("[D]efendants were shareholders, employees, directors, and managers of the plaintiff corporation and clearly owed the plaintiff corporation the fiduciary duties commensurate with their respective positions."); ATC Distrib. Group, Inc. v. Whatever It Takes Transmissions & Parts, Inc., 402 F.3d 700, 716 (6th Cir. 2005) (finding that the district court improperly granted summary judgment to employee defendants *solely* because it did not need to consider the employees' "alleged positions of trust and access to confidential information" on the grounds that salespeople cannot owe fiduciary duties to an employer); Talenburst, Inc. v. Collabera, Inc., 567 F. Supp. 2d 261, 265–67 (D. Mass. 2008) (stating that Massachusetts law of employee-employer fiduciary duties depends on an evaluation of the whether the employee held "positions of trust and confidence"); *c.f.* Chelsea Industries, Inc. v. Gaffney, 449 N.E.2d 320, 326 (1983) (stating "Employees occupying a position of trust and confidence owe a duty of loyalty to their employer and must protect the interests of the employer.").

[36] Diamond Blade Warehouse, Inc. v. Paramount Diamond Tools, Inc., 420 F. Supp 2d. 866, 871 (N.D. Ill. 2006). The court granted injunctive relief to an employer when a former employee violated the restrictive covenants of his employment agreement and breached his fiduciary duty by soliciting customers and other employees. *Id.*

[37] 548 S.E. 2d 704 (N.C. 2001).

[38] *See id.* at 708; Bret L. Grebe, *Fidelity at the Workplace: The Two-faced Nature of the Duty of Loyalty under Dalton v. Camp*, 80 N.C. L. REV. 1815, 1826 (2002).

[39] Bret L. Grebe, *supra* note 38, at 1821.

[40] *Dalton,* 548 S.E.2d at 709. The former employee had responsibilities "not unlike those of employees in other businesses and can hardly be construed as uniquely posi-

> To the extent that the holding in *Food Lion, Inc.* . . . can be read to sanction an independent action . . . we conclude that the federal district court incorrectly interpreted our state case law . . . . [A]n examination of our state's case law fails to reveal support for the . . . contention that this Court would broaden the scope of fiduciary duty to include food-counter clerks employed by a grocery store chain.[41]

Rather than obliquely relying on facts that show any employee being charged with fiduciary duties is in actuality an officer of the employer or implicitly establishing a presumption against the fiduciary status of lower-level employees, a much more direct approach would be advisable. Direct development of the law in this manner would not only provide clarity and a more rational analytical approach, but it would also provide better guidance to employers, employees, and those providing advice to them concerning the fiduciary obligations of all levels of employees.

This direct approach is apparent in Wisconsin common law. The Supreme Court of Wisconsin established an initial threshold to be met when the claim is for an employee's breach of the duty of loyalty.[42] The threshold question is whether the employee has an agency relationship;[43] if the employee is a "key employee" then the duty of loyalty is present.[44] The determination of whether one is a key employee depends on the nature of the employment duties.[45] In this particular case, the court looked to the fact that the employee was the "Procure-

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tioning him to exercise dominion." *Id. Accord* Reichhold Chemicals, Inc. v. Goel, 555 S.E.2d 281 (N.C. App. 2001).

[41] *Dalton*, 548 S.E.2d at 709. The federal district court held a cause of action for breach of fiduciary duty had been stated against supermarket employers who were actually television reporters who did not disclose their true identities in securing employment and later disclosed food mishandling via videotaping in the workplace. Food Lion, Inc. v. Capital Cities/ABC, Inc., 951 F. Supp. 1224 (M.D.N.C. 1996).

[42] Burbank Grease Servs., L.L.C. v. Sokolowski, 717 N.W.2d 781 (Wis. 2006).

[43] Burg v. Miniature Precision Components, Inc., 330 N.W.2d 192 (Wis. 1983).

[44] Burbank, 717 N.W.2d at 303–04 (citing Burg v. Minature Precision Components, Inc. 330 N.W.2d 192 (Wis. 1983); Aon Risk Servs., Inc. v. Liebenstein, 710 N.W.2d 175 (2006)). *See also* Marshfield Machine Corp. v. Martin, 630 N.W.2d 275 (Wis. Ct. App. 2001); Modern Materials, Inc. v. Advanced Tooling Specialists, Inc., 557 N.W.2d 835, 838 (Wis. Ct. App. 1996).

[45] *Burbank*, 717 N.W.2d at 796 (citing *Aon*, 710 N.W.2d at 175).

ment/Territory manager" and stood in a confidential relationship regarding trade secrets and other confidential data provided to him in this particular management position.[46] The details of the employee's responsibilities gave rise to the fiduciary duties of an agent and created the duty of loyalty and the duty not to disclose information material to the agency relationship.[47] Canadian employment law recognizes that while all employees owe a basic contractual duty of loyalty to their employers, only certain employees, based upon their duties and responsibilities, owe the more exacting fiduciary duties to employers.[48]

Only a few states statutorily define the agency relationship, one of which is the State of Georgia.[49] Georgia statutes define the agency relationship as arising "wherever one person, expressly or by implication, authorizes another to act for him or subsequently ratifies the acts of another in his behalf."[50] In addition, Georgia courts have held that an employer-employee relationship does not typically create an agency relationship unless the employee is vested with authority to act on behalf of the employer.[51] Fiduciary obligations such as a duty of loyalty do not extend to low level employees in Georgia.[52]

The scope of the duty of loyalty an employee owes to an employer in New Jersey varies with the nature of their relationship. [53] Employees performing low-level tasks owe a lesser duty than those occupying a position of trust and confidence.[54] In

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[46] *Id.* at 797.

[47] *Id.* at 797–98.

[48] James C. Oakley, *Employee Duty of Loyalty -- A Canadian Perspective*, 20 COMP. LAB. L. & POL'Y J. 185, 190 (1999).

[49] ALA. CODE § 8-2-1 (2008); CAL. CIV. CODE § 2307 (West 2009); GA. CODE ANN. § 10-6-1 (2008); MONT. CODE ANN. § 28-10-201 (2008); N.D. CENT. CODE § 3-01-06 (2008); S.D. CODIFIED LAWS § 59-2-2 (2008).

[50] GA. CODE ANN. § 10-6-1 (2008).

[51] *See* Atlanta Mkt. Ctr. Mgmt. Co. v. McLane, 503 S.E.2d 278 (Ga. 1998); *see also* Physician Specialists in Anesthesia, P.C. v. Wildmon, 521 S.E.2d 358, 360 (Ga. Ct. App. 1999).

[52] *See* Se. Consultants, Inc. v. McCrary Eng'g Corp., 273 S.E.2d 112 (Ga. 1980). *See Physician Specialists in Anesthesia*, 521 S.E.2d at 360–61 (noting that an employee does not have fiduciary duties when the agency relationship simply involves an employee who has no authority to create obligations on behalf of the employer and no right or access to confidential and corporate records).

[53] Cameco, Inc. v. Gedicke, 724 A.2d 783, 789 (N.J. 1999).

[54] *Id.* The court cogently explained:

Cameco, Inc. v. Gedicke,[55] a salaried employee, while still employed, established a business to supplement his income without disclosing this to his employer.[56] The court found the employee's fiduciary duty may have been breached even though the supplemental business did not directly compete with the employer's business simply because the new business may have assisted the employer's competitors.[57] The court remanded for a finding as to whether the specific conduct did amount to a breach of duty of loyalty.[58] The court did advise that the "egregiousness of the employee's conduct may affect the determination of" whether a breach had occurred and indicated the facts surrounding the employment itself also shaped the outcome:[59]

> Facts suggesting that [the employee] did not breach his duty of loyalty are that he was a low- or mid-level salaried employee; that during his employment, [he] was not subject to any contractual limitation preventing him from establishing an outside business; that he did not cause [the employer] to lose any customers, sales, potential sales, or profits; and that he did not compete directly with [the employer] or render substantial assistance to any of its competitors.[60]

> A reality of contemporary life is that many families will consist of two wage earners, one wage earner with two jobs, or both. For some employees, particularly those earning low or modest incomes, second sources of income are an economic necessity. For them, a second job or "moonlighting" is the only way to make ends meet. Conversely, employers need the assurance that employees will not disserve them by furthering their own interests or those of competitors at the employers' expense.

Id.

[55] *Id.*

[56] *Id.* at 786-87.

[57] *Id.* at 788. The trial court, however, had dismissed the employer's complaint and found the employer's testimony was "exaggerated" and vindictive, and concluded that the employee's actions were not detrimental to the employer, the employee's new business did not compete directly with the employer, and the employer had not suffered any damages. *Id.* at 787.

[58] *Id.* at 792.

[59] *Id.* at 789.

[60] *Id.* at 792. The court further opined that the fact finder could also determine that the employee's assistance to any competitor was so insubstantial or that any competition between the alleged competitors and the employer was so insubstantial that the employer did not breach any duty. *Id.*

A somewhat similar approach to the threshold has developed in other jurisdictions. The Tenth Circuit Court of Appeals interpreted Texas law to mean that agency relationships, and the fiduciary duties that attach, are not automatically assumed merely based on an employee-employer relationship.[61] Instead, the court looked at the particular facts of the employment circumstances and used them in analyzing whether an agency relationship had been created.[62] While courts frequently state an employee owes his or her employer a fiduciary duty, some courts will not recognize an independent claim for a breach of a duty of loyalty unless there is an underlying fiduciary relationship beyond a mere employment situation.[63] When the employee in *Rash v. J.V. Intermediate, Ltd.*[64] sued his former employer for fraud and breach of contract, the former employer counterclaimed alleging breach of employment contract, breach of fiduciary duty, and breach of the duty of loyalty.[65] The trial court granted the employee's motion for a judgment as a matter of law on the counterclaim for breach of fiduciary duty because no special relationship of trust and confidence existed between the employee and the employer.[66] The issues of breach of contract and breach of the duty of loyalty did go to the jury with the jury finding for the employee as to breach of contract, but granting the former employer's counterclaim damages due to the employee's breach of the duty of loyalty.[67] The appellate court, however, found that the trial court had erred because the facts of this employment not only gave rise to an agency relationship but also that the undisputed evidence showed the employee had breached the fiduciary duty.[68] In applying Texas law, the court recognized that employees are not necessarily agents with accompanying fiduciary duties and opined that fiduciary duties, while imposed on some business relationships because of "special trust,"[69] are not part of "every relationship involving a high degree of trust and confidence."[70] In determining as a matter of law that a fiduciary relationship, and therefore fiduciary duties, did indeed exist in this case, the court examined the employee's specific duties.[71] The employee had the ability to negotiate contracts with authority over subcontracts and he had a written employment contract in which he not only agreed to perform the duties of an agent, but also consented to devote "full work time and efforts to the business and affairs" of his employer.[72] Since these duties rose to the level of a "special trust," the court held that the employee had breached his fiduciary duty by failing to disclose his interest in another company that competed and contracted with the employer.[73]

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[61] Rash v. J.V. Intermediate, Ltd., 498 F.3d 1201 (10th Cir. 2007).

[62] *Id.* at 1207–09.

[63] *Compare* Graphic Directions, Inc. v. Bush, 862 P.2d 1020 (Colo. Ct. App. 1993) (stating that fiduciary duties extend to more than corporate officers and high level employees) *and* Cenla Physical Therapy & Rehab. Agency, Inc. v. Lavergne, 657 So.2d 175, 176-77 (La. Ct. App. 1995) (noting that even "minor-role-playing employees" owe fiduciary duties to employers) *with* Beverly Hills Concepts, Inc. v. Schatz & Shatz, 717 A.2d 724, 729 (Conn. 1998) *and* Eaton Corp. v. Giere, 971 F.2d 136, 141 (8th Cir. 1992) (stating that a cause of action for breach of the duty of loyalty is encompassed in a claim for a breach of fiduciary duty).

[64] 498 F.3d 1201 (10th Cir. 2007).

[65] *Id.* at 1205-06.

[66] *Id.* at 1208.

[67] *Id.* At trial, the employee had requested $564,993 in damages and the jury awarded him $444,933 while the former employer requested $143,000 on its counterclaim for breach of duty of loyalty and the jury awarded $71,500 on the counterclaim. *Id.* at 1206.

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[68] *Id.* The Tenth Circuit Court of Appeals remanded for a jury determination of the damages on the breach of fiduciary duty claim and for a judicial determination of the remedy of forfeiture. *Id.* at 1215–16.

[69] *Id.* at 1207 (citing Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 200 (Tex. 2002)).

[70] *Id.* at 1207 (citing Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 176–77 (Tex. 1997)). Texas courts consider it "impossible to give a definition of the term" fiduciary duties in a way "comprehensive enough to cover all cases." *Johnson*, 73. S.W.3d at 199.

[71] *Rash*, 498 F.3d at 1208. The court pointed to three other cases where Texas courts have found employees to be agents and fiduciaries. *Id.* (citing *Johnson*, 73 S.W.3d at 202–03 (holding that a law firm's associate had a fiduciary duty when the associate "specifically undertook to act as [an] agent in obtaining an agreement" to represent helicopter crash victims); Kinzbach Tool Co., v. Corbett-Wallace Corp., 160 S.W.2d 509, 513 (Tex. 1942) (holding that a fiduciary duty existed where an employee "permitted his employer to consummate a contract where[] it bought for $25,000 that which he . . . knew might be bought for $20,000," failed to disclose this fact to his employer, and did not disclose "that he was acting for the opposite side in the deal for a profit to himself"); Daniel v. Falcon Interest Realty Corp., 190 S.W.3d 177, 185–87 (Tex. App. 2005) (holding that a fiduciary duty existed when the employee was "hired to serve as a project manager and on-site superintendent for the project" whose specific responsibilities included "soliciting bids, setting the scope of work for each subcontractor, reviewing the bids, letting the contracts, and overseeing people working on the project")).

[72] *Rash*, 498 F.3d at 1208–09. The employee had sole management responsibilities of a branch; he was charged with finding facilities to operate the business, hiring and training employees, gathering tools and equipment, promoting the venture, soliciting and receiving bids, and their invoices, setting customer rates, and tracking all costs. *Id.* at 1208.

The court in *Rash* carefully segregated an employee's "common law" duty of loyalty from an agent's fiduciary duty and stated:

> [T]he fiduciary relationship establishes a distinct and separate obligation than the duty of loyalty to an employer described above. The fiduciary duty exists because of the "peculiar" trust between the employee-agent and his employer-principal. . . . Thus, the bonds created by a fiduciary relationship are stronger and the obligations are correspondingly more rigorous than those ascribed to the duty of loyalty.[74]

Not only did the court distinguish between the duty of loyalty, which every employee owes to her employer, and the fiduciary duty owed by an agent, but the court also stated that an agent's fiduciary duty may be "more wide-ranging" and the employee's actions could constitute a "more egregious violation under a fiduciary theory than under a loyalty theory."[75]

It is when we look to the damages to be applied to a particular case that these distinctions become critical. For a breach of the duty of loyalty, typically an employer has the option of recovering either the profit earned by the disloyal employee or the profit the employer would have earned had the employee not been disloyal.[76] The remedy of disgorgement[77] is not only to compensate for the wrong but to act as a disincentive to prevent such wrongs from occurring.[78] The concepts of restitution and unjust enrichment[79] also support the legal basis for liability[80] even though the employer is not able to establish that the employee's breach of the duty of loyalty caused a loss to the employer.[81] Some courts, however, require a strict causal connection between the breach of fiduciary duty and the amount of damages claimed.[82]

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[73] *Id.* at 1209–11.

[74] *Id.* at 1211.

[75] *Id.* Since the employer had argued the breach of fiduciary duty claim was an alternative, not a supplement, to the duty of loyalty claim, the court held that a jury determination on the damages for breach of fiduciary duty would have to be offset by the previously awarded amount on the breach of duty of loyalty claim. *Id.* at 1212.

[76] *See* Gomez v. Bicknell, 756 N.Y.S.2d 209, 214 (2002).

[77] *See generally* Daniel v. Falcon Interest Realty Corp., 190 S.W.3d 177, 186-87 (Tex. Ct. App. 2005).

[78] *Gomez*, 756 N.Y.S.2d at 113-14 (citing Diamond v. Oreamuno, 248 N.E.2d 910, 912 (N.Y. 1969)). *See* Millbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d 537, 543 (2d Cir. 1994) (stating that a principal could recover for breach of fiduciary duty without proving "but for" causation or proximate cause).

When a strict causal connection is required, or when a disloyal employee has not realized any gain, or when it is difficult to prove that any harm to a principal resulted from such disloyalty, forfeiture may be the remedy utilized by a court.[83] Forfeiture not only has a valuable deterrent effect because it signals that some adverse consequences will inure to any disloyal employee,[84] but it also enables the employer to have a remedy at a much lower cost than protracted litigation:[85]

> Forfeiture is based on two propositions: (1) the principal is considered not to have received what he bargained for if the agent breaches his fiduciary duties while representing the principal, and (2) fee forfeiture is designed to discourage agents from being disloyal to their principal or "to protect relationships of trust by discouraging agents' disloyalty." The re-

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[79] *See generally* VRG Corp. v. GKN Realty Corp., 641 A.2d 519, 526 (N.J. 1994) (defining the concepts of restitution and unjust enrichment).

[80] "[A] plaintiff suing for breach of fiduciary duty can recover damages for mental anguish" in some jurisdictions. Justice Terry Jennings, *Fiduciary Litigation in Texas*, 69 TEX. B.J. 844, 848 (2006) (citing Perez v. Kirk & Carrigan, 822 S.W.2d 261, 266-67 (Tex. App. 1991)).

[81] RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. d(1) (2006).

[82] Augat, Inc. v. Aegis, Inc., 631 N.E.2d. 995, 999 (Mass. 1994).

[83] Katalinic v. Bd. of Trustees of Mun. Employees', Officers', & Officials' Annuity & Benefit Fund, 898 N.E.2d 243, 248 (Ill. App. 1st 2008) (stating that forfeiture is sufficient so long as there is a causal connection with the employment); Musico v. Champion Credit Corp., 764 F.2d 102, 113 (2d Cir. 1985) (noting the trend in New York law is toward the Restatement position of apportioning forfeitures of a disloyal agent's compensation in specified circumstances).

[84] RESTATEMENT (THIRD) OF AGENCY (THIRD) § 8.01 cmt. d(2) (2006).

[85] *Id.* Employers can also pursue appropriate remedies against employees for misappropriation of trade secrets, but proving such has been so difficult, expensive and unpredictable that employers have found it prohibitive to use except in extreme cases. Yuval Feldman, *Experimental Approach to the Study of Normative Failures: Divulging of Trade Secrets by Silicon Valley Employees*, 2003 U. ILL. J.L. TECH. & POL'Y. 105, 117–18 (2003).

> medy of forfeiture "applies generally in agency relationships."[86]

The facts of the employment relationship and the extent of the employee's actions should affect the applicability and the extent of any forfeiture.[87] Forfeiture is generally an equitable remedy, comparable to a constructive trust.[88] Generally, a former employee may be required to repay all compensation[89] received during the period of her disloyalty.[90] Some states do not permit set-off for properly performed services during the period of disloyalty,[91] while others limit forfeiture or apportion fees under certain conditions.[92] Complete forfeiture is imposed in Massachusetts unless the disloyal conduct is not egregious and the employee has established that his services were valuable beyond the parameters of his disloyal conduct,[93] yet little attention actually has been paid to the egregiousness factor by the courts.[94] Instead, the baseline proposition has remained one of complete forfeiture by a disloyal employee.[95] The approach to forfeiture in New Jersey, however, is somewhat different.[96] The court in *Cameco, Inc. v. Gedicke* outlined four considerations that would affect whether forfeiture was an appropriate remedy for breach of an employee's duty.[97] First, the court looked at the existence of contractual provisions, and whether such provisions permitted or specifically prohibited certain behavior.[98] Second, the court determined whether the employer knew of or agreed to the employee's conduct, with the court allotting specific interest to any employee disclosures to the employer.[99] Third, the court examined the status of the employee and her relationship to the employer.[100] Finally, the court looked at the nature of the employee's second source of income.[101] The usefulness of these four considerations is somewhat undercut by the court's recognition that the guidelines require reference to specific facts, which, due to an inadequate record, were lacking in this particular case.[102] While the court in *Rash v. J.V. Intermediate, Ltd.* did not list similar considerations for the applicability of the remedy of forfeiture, it did state that forfeiture was a proper equitable remedy that applied only to *clear and serious* violations of fiduciary duties and thus remanded for a judicial determination of the propriety of the remedy of forfeiture.[103] Before this judicial determination could be made, the court, upon remand, submitted fact questions to the jury concerning the timing of the employee's breach of fiduciary duty, the willfulness of the employee's acts, and the damages caused thereby.[104] Because of this, it appears as though the court believes these facts will determine if the violations were clear and serious.

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[86] Rash v. J. V. Intermediate, Ltd., 498 F.3d 1201, 1212 (10th Cir. 2007) (quoting Burrow v. Acre, 997 S.W.2d 229, 237-38, 242-43 (Tex. 1999)) (citations omitted).

[87] Futch v. McAllister Towing of Georgetown, Inc., 518 S.E.2d 591, 596–97 (S.C. 1999) (stating that in assessing compensation in forfeiture, "the nature of the employment relationship, the nature and extent of the employee's services and the breach of duty, the loss or expense caused to the employer by the breach of duty, and the value to the employer of the services properly rendered by the employee" should be taken into consideration). *See also* Hartford Elevator, Inc. v. Lauer, 289 N.W.2d 280, 287 (Wis. 1980) (stating that the court must focus on the particular circumstances of a case rather than adopting a rigid rule requiring forfeiture of all compensation during disloyalty); Jet Courier Serv. v. Mulei, 771 P.2d 486, 497 (Colo. 1989) (stating that the court should consider the nature of the employment relationship, the impact or potential impact of the employee's actions on the employer's operations, and the benefit received by the employer during the period of disloyalty).

[88] Justice Terry Jennings, *Fiduciary Litigation in Texas*, 69 TEX. B.J. 844, 848 (2006) (citing Burrow v. Arce, 997 S.W.2d 229, 238 (Tex. 1999)).

[89] *See* Foley v. Am. Elec. Power, 425 F. Supp. 2d 863, 875-76 (S.D. Ohio 2006) (deferring that compensation plan benefits constitute forfeitable employee compensation); Phansaalkar v. Anderson Weinroth & Co., L.P., 344 F.3d 184, 210-11 (2d Cir. 2003) (stating that employer offered investment opportunity and its realized benefits are subject to forfeiture by a disloyal employee).

[90] G.K. Alan Assoc., Inc. v. Lazazari, 840 N.Y.S.2d 378, 384-85 (App. Div. 2007) (noting that federal courts typically hold forfeiture to only compensation due in relation to the disloyal action or actions); Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker, 865 N.Y.S.2d 14, 23–24 (App. Div. 2008) (stating that in terms of attorney disloyalty in the attorney-client relationship, a separate hearing is required to fully establish disloyalty for forfeiture purposes); Aramony v. United Way Replacement Benefit Plan, 191 F.3d 140, 153 (2d Cir. 1999) (noting that under New York law employees are obliged to forfeit salary during the period of disloyalty).

[91] Jet Courier Serv., Inc. v. Mulei, 771 P.2d 486, 505 (Colo. 1989) (Mullarkey, J., concurring) ("Set-offs against wage claims are disfavored because of the inherent economic inequity between the employer and employee."); ABC Trans Nat'l Transp., Inc. v. Aeronautics Forwarders, Inc., 413 N.E.2d 1299, 1315 (Ill. App. 1980) (stating that while forfeiture is proper during periods of disloyalty, "[t]he agent retains compensation rightfully earned before the breach, for specific periods").

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[92] Sequa Corp. v. GBJ Corp., 156 F.3d 136, 148-49 (2d Cir. 1998) (applying a rule of apportionment under New York law to the fees related to the specific items of work for which the agent had acted disloyally); Bessman v. Bessman, 520 P.2d 1210, 1219 (Kan. 1974) (stating that a minor breach affecting a single transaction will not result in forfeiture of the compensation attributable to other transactions).

[93] Tory A. Weigand, *Employee Duty of Loyalty and the Doctrine of Forfeiture*, 42 BOSTON B.J., Sept.-Oct. 1998, at 6, 7.

[94] *Id.* at 21-22 (citing Boston Children's Heart Found., Inc. v. Nadal-Ginard, 73 F.3d 429, 435 (1st Cir. 1996)).

[95] *Id.*

[96] *See, e.g.,* Simulations Sys. Tech., Inc. v. Oldham, 634 A.2d 1034 (N.J. App. 1993); Joseph Toker, Inc. v. Cohen, 169 A.2d 838 (N.J. App. 1961).

[97] Cameco, Inc. v. Gedicke, 724 A.2d 783, 791 (N.J. 1999). The court looked to whether the employee's conduct was "willful and deliberate" as well as the "egregiousness" of the actions. *Id.*

[98] *Id.*

[99] *Id*

[100] *Id.* This third consideration would appear to mirror the analysis concerning whether a fiduciary relationship even existed to justify the application of any doctrine of forfeiture. "An officer, director, or key executive, for example, has a higher duty than an employee working on a production line." *Id.*

[101] *Id.* at 791.

A disjunction would seem to occur between the agency concept making the employment relationship one of agency and the fiduciary duties and the remedies for breach of those duties as applied to lower-level employees. At best, applying the lens of agency law to all employment situations requires most jurisdictions to engage in an overlapping analysis in first trying to decide if the specific facts give rise to a breach of fiduciary duty by an employee, and then again when adjudicating the appropriate remedy. An officer or an employee who possesses significant discretion and authority in her position should have higher duties of loyalty imposed by law than those of the lower-level employee. The law of agency would appear to be best situated to properly define these distinctions. While the concept of a broad duty of loyalty owed to every employer is an enticing one, if an employer is uniquely vulnerable to an employee who holds discretion or authority, the employer has it within its power to take additional measures for adequate protection.[105] The lower-level employee, however, has no such ability to insulate himself from the overbroad application of fiduciary duties. The sweeping categorization of every employee as an agent without permitting distinctions for those employees who are not "key"[106] or who do not hold a position of "special trust"[107] creates the very real possibility that low-level employees may suffer from the harsh forfeiture remedies without any allowance made for work performed during a period outside of the perceived breach. While total forfeiture may make sense as a punitive or deterrent measure in the case of an officer or confidential employee, it unfairly tips the scale in favor of the employer when it over broadly includes all employees. The concept of employee fiduciary duties should be more carefully defined and not just applied to all.

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[102] *Id.* at 792. John A. Boyle, *Moonlighting–Employee Assistance to an Employer's Competitor, Including Formation of a Competing Business, May Breach the Employee's Duty of Loyalty and Require Forfeiture of Compensation Paid to the Employee During Periods of Disloyalty*, 30 SETON HALL L. REV. 673, 681 (2000).

[103] Rash v. J. V. Intermediate, Ltd., 498 F.3d 1201, 1212, 1216 (10th Cir. 2003). Upon remand, the jury's involvement in the equitable remedy of forfeiture is limited to resolving contested fact issues. *See* Rash v. J.V. Intermediate, Ltd., No. 04-CV-681-FHM, 2008 WL 2568305, at *1 (N.D. Okla. June 20, 2008).

[104] *Rash*, 498 F.3d at 1212, 1216.

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[105] Employers should seek protections as part of an employment contract, confidentiality agreement, trade secrets, and the like. Both employer and employee would be on notice as to the terms and have an opportunity for a bargained for exchange.

[106] Burbank Grease Serv., LLC v. Sokolowski, 717 N.W.2d. 781, 796 (Wis. 2006).

[107] *Rash*, 498 F.3d at 1207.

ANTECEDENT LAW: THE LAW OF PEOPLE-MAKING

Carter Dillard[*]

INTRODUCTION: THE GREAT ASSUMPTION

The term "law," at least as it is used in the social sciences, is not easy to define. Modern legal theorists, like H.L.A. Hart, have spent a lot of time showing that.[1] But, while the sufficient conditions for law to obtain are debated, in most cases, there are at least two necessary conditions: there must first exist some group of persons, amongst whom the law can exist, and law must influence the relations of those persons, most often their behavior towards one another.[2] Certainly older understandings of law, such as John Austin's notion of norm-subjects under orders enforced by threats from the sovereign,[3] paint a mental picture of people whose behavior is also susceptible to influence. And, although more nuanced, modern concepts of law like

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[1] *See* H.L.A. HART, THE CONCEPT OF LAW 5, 16 (2d ed. 1994).

[2] *See, e.g.*, THOMAS AQUINAS, *The Treatise On Law Q. 90: The Essence of Law*, *in* ST. THOMAS AQUINAS ON POLITICS AND ETHICS 44 (Sigmund ed. & trans., 1988) (describing law as "a rule or measure of action by which one is led to action or restrained from action"); SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 39 (Garland 1978) (defining law as rules of human conduct or action); E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN 275 (1954) (describing law's primary function in its universal aspect as setting up limitations on rights, duties, powers, etc.); HERMANN KANTOROWICZ, THE DEFINITION OF LAW 12 (1958) (describing law as "a body of rules aiming at the prevention or the orderly settlement of conflicts"); HANS KELSEN, PURE THEORY OF LAW 31 (Max Knight trans., 1967) (identifying law as regarding human behavior); Andrei Marmor, *The Nature of Law*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring 2010), *available at* http://plato.stanford.edu/entries/lawphil-nature/ (noting that law "purports to guide human behavior, giving rise to reasons for action"). Even this simple description does not fully capture all instances of law, i.e., law between nations, or law between humans and animals, but we can say that it captures most instances of law.

[3] *See* HART, *supra* note 1, at 16.

Hart's central set of elements, or Ronald Dworkin's treatment of law as an interpretive concept, also suggest this image of people who are susceptible to law's influence as they relate to one another.[4] Thus, in our common understanding of law, the bare minimum that emerges is a mental picture of people standing in relation to and influenced in their relation towards one another.

But this bare concept of law fails to account for exactly how the people entered the picture, i.e., the particular system of laws that facilitate entry into the polity. Nor does it explain why these people are all susceptible to the influence of the thing we call law. It is as if the persons to whom law is addressed have simply appeared, carrying with them whatever attributes or qualities they need to respond to law. In our mental picture, they exist *ex ante*. It is as if the law has simply arrived at a party with the guests already assembled, each well prepared, or having the necessary attributes, to assume whatever role the law gives them.

However, while as a historic matter people probably did pre-date law, as a conceptual matter they need not. Any system of laws or norms will also determine, whether by prescription or omission, the circumstances in which persons enter that system, and will thereby play a role in creating them. For example, when states decide to give a tax credit to promote childbearing or charge a fee to discourage it, to legalize or ban abortion, to promote or prevent certain forms of immigration, or to do nothing at all with regard to immigration, states make choices that determine the presence of persons within their borders.

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[4] *See* HART, *supra* note 1, at 79-123, 155; RONALD DWORKIN, LAW'S EMPIRE 86 (1986); *see also* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 260, 276 (2000); JOSEPH RAZ, PRACTICAL REASON AND NORMS 144 (1999); Persons being susceptible to laws, as is discussed in notes 36-46 *infra* and the accompanying text, means more than something as simple as one's body being susceptible to arrest, or even merely being responsive to physical sanction. *See, e.g.*, Jeremy Waldron, *All We Like Sheep*, 12 CAN. J.L. & JURIS. 169, 176 (1999) ("If they abide by them only to the extent (say) that cats and dogs do—i.e., only to the extent that their physical behavior is actually forced into conformity by leashes, chains, muzzles, kicks, etc.—then they may not be regarded as a part of the population among whom the legal system in question exists."). Susceptibility might be thought of as a spectrum that starts with something like a "disposition" to obey the law, which runs towards becoming the "angels" that Raz refers to as the requisite norm-subjects for a sanctionless legal system. *See* FINNIS, *supra* at 267; RAZ, *supra* at 159.

And, when a state determines the circumstances in which persons enter the polity, it is also inevitably determining something about how those persons will relate to the polity's laws, or what may be called his or her susceptibility to law. If a given polity has a written, as opposed to an oral, system of laws, but does nothing to ensure those entering it know how to read, the polity—in "creating" its new members—is determining something about how those persons will relate to its laws.

There is thus a body or form of law that exists before, or antecedent to, our most bare concept of law. But, we do not now divide between the antecedent law that creates (or makes present) persons *qua* norm-subjects and the law that then directs them as such. It is as if law is a key that we presume fits the lock, i.e., the person *qua* norm-subject. But we do not notice that the law plays a special antecedent role in creating the locks and in shaping them as such.

Perhaps we can explain the omission in this way: it could be that our bare concept of law leaves the creation of persons *qua* norm-subjects to other disciplines and instead focuses on those persons' subsequent arrangement and constraint. Certainly political (as opposed to legal) philosophers have been more explicit about the importance of focusing not just on extant members of the polity, but also on those entering it. Addressing the creation of new members in a polity, Rousseau said:

> Again, attention must be given to the greater or lesser fertility of women, to what the country can offer that is more or less favorable to the population, to the number of people the legislator can hope to bring together through his institutions. Thus, the legislator should not base his judgment on what he sees but on what he foresees. And he should dwell less upon the present state of the population as upon the state it should naturally attain.[5]

Perhaps people-making is a matter best left to politics, or economics, rather than law. But, admittedly, Hart does briefly touch upon the issue, though unlike Rousseau he focuses more on the susceptibility side of the coin. He said in *The Concept of Law*:

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[5] JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 45 (Donald A. Cress ed. & trans., Hackett 1987) (1762).

> Thus, the still young sciences of psychology and sociology may discover or may even have discovered that, unless certain physical, psychological, or economic conditions are satisfied, e.g. unless young children are fed and nurtured in certain ways within the family, no system of laws or code of morals can be established, or that only those laws can function successfully which conform to a certain type.[6]

Could it be that looking at these matters from a legal perspective, as opposed to a political or economic one, leads to different results? Should law account for the creation and susceptibility of people, or leave that matter to other disciplines, so that the law simply takes whatever people political and economic systems produce? It may be that the most basic notion of law itself will lead us to think different things about people-making, about the creation of persons in our basic mental picture of the legal system, than our basic notions of power or of economics would. That is, making norm-subjects may be a different matter than making economic-subjects or power-subjects. Legal systems may demand special types of persons; persons different than those required for political or economic systems. The various conceptions of law that exist may all tell us something in common about what we need to do to make norm-subjects, perhaps something more than the unsurprising point that the law ought to make people that are responsive to it.

We might even go so far as to say that a system made up of economic-subjects and/or power-subjects, as opposed to norm-subjects (or what we may all legal-subjects), that is, a system whose members are responsive to political and/or economic stimuli rather than norms, is not a legal system at all. Citizens in a legal system would be legal persons, primarily or exclusively responsive to the stimuli of the norms alone, rather than political or economic persons responsive to the coercive stimulus of the stick (power) or the incentivizing and disincentivizing stimulus of the carrot (economics), so to speak. The dispositive test for such a system would literally be compliance with the legal norms without any associated coercive sanctions, or economic costs or benefits.

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[6] *See* HART, *supra* note 1, at 189.

But it could also be that our bare concept of law leaves the creation of subjects aside, to other disciplines, because there is something heretical in seeing the law in this way.[7] The law does not create people and give them attributes. Only a divine creator can do that. The creator makes people and gives each his/her qualities and the law must simply take these people and their qualities as it finds them.

In contrast with that view, and with the view that people-making is to be left to other disciplines like politics or economics, this Article is directly concerned with law as it creates members of a legal system, with the law that *first* sets the irreversible stage on which our traditional concept of law *then* acts. This "antecedent law" is simply a body, or form, of law. It is law that meets the necessary and sufficient condition of determining the entry of new persons into the polity, and through that, the susceptibility of those persons to law itself.

The form of antecedent law is new. But it works by grouping together existing forms of law, like laws determining procreation, immigration, and education,[8] based on their shared role in determining persons' susceptibility to law through their entry into the polity.

Much like contract or tort law, antecedent law is itself not a conception of law,[9] nor is it a descriptive theory of law's normativity.[10] It is much cruder than these things. It simply groups many existing forms of law together, making them sub-forms, much like the way immigration law groups together sub-forms like naturalization law and asylum law. Antecedent law focuses our attention on the processes that create the most basic state of legal affairs: people within a given legal system,[11] with their varying degrees of susceptibility to its laws.

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[7] The notion of antecedent law may be in tension with some views of liberal government that see the state and its laws as having no role in creating citizens, though that point is not addressed here. *See, e.g.*, Note, *Regulating Eugenics*, 121 HARV. L. REV. 1578, 1597 (2008) ("Liberalism assumes that the citizens exist prior to the state, whether in fact or by hypothesis, and that they create the state to advance their own interests.").

[8] For a discussion of the role of education law in people-making, see *infra* Part I.

[9] Antecedent law is not a candidate for changing the essential concept of law described here because it uses the more basic concepts of humans and behavior. Rather, it is a candidate for a form of law. Antecedent law is related, but not identical, to the concept of biopolitics. *See, e.g.*, Jedediah Purdy, *The New Biopolitics: Autonomy, Demography, and Nationhood*, 2006 BYU L. REV. 889, 894 ("Biopolitics comprises the relationship between individuals' control over their bodies and the power the political community may exercise over them: both the demands it may make (that they bear children, that they fight and die) and the prohibitions it may impose (no abortions, no second children).").

The argument involves three steps: the first step, Part I of this Article, defines antecedent law and describes what the form does that our existing forms of law do not. Part II is more prescriptive, advocating for a particular content for the form, or substantive antecedent law norms. Specifically, Part II identifies a state interest in "valuable autonomy" (hereinafter "autonomy"), which, following Joseph Raz, may be understood as the presence and active pursuit of morally valuable options in life.[12]

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[10] This article distinguishes antecedent law from the influential and empirically based behavioral theories of the law, which focus on *how* the law influences (if at all) our beliefs and behaviors. They range from a material incentive based law and economics approach to highly nuanced theories that explain how law shapes societal norms or accounts for cultural and moral cognition. *See, e.g.*, Kenworthey Bilz & Janice Nadler, *Law, Psychology, and Morality*, *in* 50 THE PSYCHOLOGY OF LEARNING AND MOTIVATION: MORAL JUDGMENT AND DECISION MAKING 101 (Daniel Bartels et al. eds., 2009). In contrast, antecedent law focuses on *whatever it is about the law* that creates (makes present) persons in particular circumstances, and persons *qua* the subjects of law—the lock into which the key of law is inserted. *See supra* note 6 and accompanying text. Put simply, behavioral theories determine how the law influences behavior, but antecedent law is only concerned with how the law influences the very specific behaviors that constitute people-making.

[11] This brief introductory article will not discuss the role federalism plays in antecedent law, though how antecedent law applies in overlapping polities is an obvious question at this point.

[12] The term "valuable autonomy" is taken from Raz and his perfectionist view of liberalism. Raz finds that "[a]utonomy is valuable only if exercised in pursuit of the good." JOSEPH RAZ, THE MORALITY OF FREEDOM 381 (1986). This article understands the concept as freedom to make and act on one's subjective choices, but within the bounds of some objective morality. Do we find equal value in one's freedom to feed a starving animal as we find in one's freedom to kick that same animal down the street? Arguably we do not. Raz's autonomy is also a kind of positive freedom, where the state does not make its citizens free by simply ignoring them, but must provide a range of morally valuable options (i.e., the option to become a doctor, but not an alcoholic; to be literate, but not illiterate; to care for animals, but not abuse them) and ensure that each citizen has the "deliberative and volitional capacities" (or civic qualities) to make use of the choices. *See* Leslie Green, *Un-American Liberalism: Raz's 'Morality of Freedom,'* 38 U. TORONTO L.J. 317, 324-25 (1988). This paternalistic view of freedom rejects moral relativism and subjectivism and finds that we value freedom only once we have certain capacities, and then only because it lets us do things that are good, things we objectively value.

It then argues that antecedent law can enable a state to maximize autonomy by regulating the creation and susceptibility to law (or what might be called civic quality) of its citizens, rather than focusing merely on those citizens' subsequent arrangement and constraint. Lastly, Part III explores three counterarguments that are likely to be made against antecedent law and the content proposed in this article.

What is the value of such a reductive approach, of dividing law in this simple way, between law and pre-law? How does this add to the existing literature? It adds to the literature in four ways:

First, there is a logical distinction, not made before, between the law that creates persons, and in doing so makes them subject to its influence, and the law that subsequently directs them. The notion of antecedent law, or law before law, seeks to account for this distinction. It seeks to fill a gap in our discipline that makes it more static than it has to be by addressing the behavior that determines whether persons will exist and whether they need to be, or can be, subject to coordination and constraint.[13]

Second, antecedent law may add to the concept of the rule of law, and even become part of the *desiderata* for it.[14] It seems inconceivable that a state can establish a legal system consistent with the rule of law without taking special regard of the actual creation of the persons within it, both of the number created as well as their susceptibility to its laws. Is the system simply the set of laws themselves, irrespective of the quantity and civic quality of the people to whom they are addressed?

Third, antecedent law, as a form of law, may help distinguish law from other disciplines like economics and politics. As will be discussed more fully below, a legal system—one that uses norms to guide behavior—may call for a different constituency, both in number and in kind, than a system that is merely economic or political, i.e., one that uses material incentives and disincentives, or coercion, rather than norms, to guide behavior.

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[13] This article does not use "static" in the sense that Hart uses the term, to refer to the slow evolution of primary rules. *See* HART, *supra* note 1, at 92. Rather, it refers to the meaning Rousseau suggests. *See supra* note 5 and accompanying text.

[14] *See* FINNIS, *supra* note 4, at 270.

Finally, in a less theoretical and much more doctrinal sense, antecedent law may also help us explain what is arguably a very specialized level of state interest, speaking in purely U.S. constitutional law parlance. The Supreme Court uses extreme rhetoric when referring to the state's compelling interest in laws and policies that will determine the nature of future citizens, often using superlatives across a range of cases.[15] Scholars like Erwin Chemerinsky cite the state's interest in child welfare, along with national security, as clear examples of things in which the state has a compelling interest.[16] By grouping together laws around this shared characteristic, or their role in shaping the future constituency of the polity, we might prioritize it as a category, beyond the rhetoric.[17] In other words, we might more clearly discuss, determine, and understand what common, and perhaps unique, level of constitutional interest a state has in things like procreation, immigration, and education. We might distinguish between the state's interest in law that creates persons and law that then directs them.

The abortion debate in the United States today is emblematic of the law and antecedent law distinction. The opposing points of the debate arise from conflicting interests in liberty, equality, and in protecting the sanctity of life. The traditional view of law is focused on regulating the competing interests of existing persons in the polity, focused on the mental picture of people who now exist in it. But abortion, from an antecedent law perspective, is perhaps most interesting for how it determines the conditions in which prospective citizens will or will not enter the polity.[18] It literally involves the physical remaking of the polity debating it. Could our shared and overriding interest in that issue push these other interests into the background and also provide common ground for compromise, perhaps because there are widely-shared and objective standards for the conditions under which persons should and should not enter the polity?

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[15] *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 790 (1982) (Rehnquist, J., dissenting) ("Few could doubt that the most valuable resource of a self-governing society is its population of children."); Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens.") (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (referring to education as "perhaps the most important function of state and local governments"); Prince v. Massachusetts, 321 U.S. 158, 168 (1944) ("[D]emocratic society rests, for its continuance, upon the healthy, well rounded growth of young people into full maturity as citizens, with all that implies.").

[16] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 767 (2002).

[17] Antecedent law appears in perhaps its most crystallized form in the no-growth ordinances of small polities (where the affects of both the number and the civic qualities of each citizen are more keenly felt). For a discussion of what those ordinances protect and why, *see generally* Tom Pierce, Comment, *A Constitutionally Valid Justification for the Enactment of No-Growth Ordinances: Integrating Concepts of Population Stabilization and Sustainability*, 19 U. HAW. L. REV. 93 (1997).

Similarly, constitutional law today focuses on the meaning of a specific document—the Constitution. But, from an antecedent law perspective, the Constitution, in regulating abortion for example, re-determines the *constituents* of the polity. Could it also be seen as *constitutional* in that sense? And could seeing it as such lead us to understand it and the controversies it mediates in different ways?

Focusing on the law's role in these matters and giving that focus a rubric drags into the open something that is otherwise left out of view by the traditional concept of law. Antecedent law is like a mill that, without being named and examined, operates quietly in the background, generating the constituent elements of law. Naming it allows us to avoid focusing myopically on the law itself rather than the growing number of persons it pertains to, and upon whose susceptibility to norms that law is based.

This Article will not systematically discuss how determining the entry of new members into the polity, and as such the polity's size, relates to susceptibility, though some themes may emerge. First, because the state must expend certain resources to ensure new persons will be susceptible to its laws, and resources are scarce, there may be a tension between growth and susceptibility. Second, because the total resources of any polity are scarce, the number of new entrants may have to be limited to avoid the type of excessive resource competition that leads to chaos, or the converse of susceptibility to law. Third, because each new entrant will dilute the role all other members play in creating the norms (e.g., through their vote), there may also be a tension between adding new members and ensuring susceptibility.

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[18] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973) (White, J., concurring) ("There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.").

These themes aside, antecedent law deserves to be named as such and examined. Our day-to-day lives are largely defined by the people around us and their civic qualities, rather than by the sea of words—unknown and unknowable to most—that gather dust in law libraries. And yet the law played a role in ensuring the presence of those around us and their susceptibility to it, as it will in the case of future generations. It is that role which this article examines.

I. DESCRIBING ANTECEDENT LAW AND ITS FUNCTIONS

Antecedent law is law that, whether by proscription, permission (such as a broad constitutional right to procreate), obligation, or omission, determines the creation or presence of people in a given legal system, and through the act of making them present, the attributes or qualities (or civic qualities) they need to be susceptible to law.[19]

Antecedent law is best conceived of as a sphere with a clearly defined center. In the center are the clearest cases of civic quality-making through creation, as with the laws determining procreation, immigration, and education.[20] It is vital to keep in mind that antecedent law regards civic quality-making *through* the process of making people present—through dictating the circumstances under which a person enters the legal system

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[19] It is to be distinguished from the field of philosophical inquiry currently known as population ethics, which is dominated by utilitarians and largely focuses on how population and welfare relate. *See* Jesper Ryberg, *The Repugnant Conclusion*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2006), *available at* http://plato.stanford.edu/entries/repugnant-conclusion. Population ethics will partly determine what the substantive content of antecedent law should be, but this brief discussion of the virtues of the form of law raises legal and political questions beyond population ethics—in fact it opens the door to policies based on them.

[20] The ways in which education relates to antecedent law are discussed below. *See infra* notes 30-33 and accompanying text.

(the circumstances in which a child is born, or the prerequisites for immigration, for example).

Of course, there are areas of overlap with less antecedent laws as one moves from the center of the sphere. Laws regulating surrogacy contracts, no-growth residential zoning, and parental liability laws involve traditional forms like contract and property law, but they may also play a lesser role in determining procreation. Thus, whether a form of law is antecedent depends on the degree to which it determines the creation or presence of persons in the system, and through that, the attributes they need to be susceptible to law.

Note too that antecedent law, as defined here, is not particularly concerned with people exiting the polity, as are laws regulating emigration, genocide, assisted-suicide, and the death penalty, for example.

The notion of someone becoming present within a given polity through immigration or procreation seems fairly straightforward. But what does it mean to be susceptible to law, or to have certain civic qualities necessary to be susceptible to law? This brief article cannot even begin to really address this issue, so the following discussion will be more in the nature of creating a placeholder and laying out a few basic principles around it.

First, civic quality need not be an all or nothing matter, but may be more like a spectrum, reflecting various degrees of susceptibility. According to some theorists, the minimum for one to be considered a member of a legal system is something just above constant physical coercion.[21] It could begin with something as simple (and base) as "fear, or compliance for the sake of some pathetic scrap of reward, or compliance based on habit, prejudice, ideology, or false consciousness. . . '[A] general habit of obedience.'"[22]

The civic quality spectrum might move from that minimum towards something like Stephen Macedo's "capacities and dispositions conducive to thoughtful participation in the activities of modern politics and civil society,"[23] or Rawls's minimum degree of "moral personality" or "political virtues" to engage in social cooperation.[24]

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[21] *See supra* note 4.

[22] Waldron, *supra* note 4, at 176 (quoting JEREMY BENTHAM, OF LAWS IN GENERAL ch. 4 (H.L.A. Hart & J.H. Burns eds., 1970) and JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 242ff (W. Rumble ed., 1995)).

At the far end of the spectrum "we can imagine other rational beings who may be subject to law, who have, and who would acknowledge that they have, more than enough reasons to obey the law regardless of sanctions. Perhaps even human beings may be transformed to become such creatures."[25] Such beings would use the law in a given legal system to guide their behavior in the absence of any coercion, and in the absence of any material incentives or disincentives, associated with the law.[26] That is, citizens would adhere to the law without its imposing any of the coercive sanctions typical of either power-based (political) or material incentive/disincentive (economic) systems.[27] The citizens would be legal persons, responsive to the stimuli of the norms alone, rather than political or economic persons responsive to the coercive stimulus of the stick or the incentivizing stimulus of the carrot, so to speak. The test for such a system, one comprised of persons possessing this highest degree of civic quality, would literally be compliance with the legal norms without any associated coercive sanctions, or economic costs or benefits.

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[23] Christopher Wolfe, Book Review, 46 AM. J. JURIS. 277, 278 (2001) (reviewing STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY (2000)) (quoting MACEDO, at 10); *see* Maxine Eichner, *Who Should Control Children's Education?: Parents, Children, and the State*, 75 U. CIN. L. REV. 1339, 1361 (2007) (describing why a democracy requires critical thinking in its citizens).

[24] *See* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 18, 20, 142 (Erin Kelly ed., 2001). For example, such a person would not think their being wealthy is a good reason to accept a system that favors the wealthy. *See id.* at 18.

[25] RAZ, *supra* note 4, at 159. Raz expresses some doubt that humans can reach this point. *See id.* at 160-61.

[26] *See* FINNIS, *supra* note 4, at 247 ("[T]he motives or reasons which people have for complying with and acting upon stipulations presented to them as authoritative (and for being willing to do so should occasion arise) vary widely."). Antecedent law's civic quality-making aspect would concern creating such motives and reasons in persons, moving in the direction of allowing them to accede to valid laws in the absence of coercion. Finnis refers to the elementary distinction between the directive and coercive forces of law; that law allows for the latter "is not the same as saying that one cannot conceive of law without coercion." *Id.* at 254.

[27] For a related sociological discussion regarding the different ways in which prisons, business firms, and universities achieve norm compliance, see generally AMITAI ETZIONI, A COMPARATIVE ANALYSIS OF COMPLEX ORGANIZATIONS (1961).

Perhaps this civic quality is simply what Richard Posner refers to as altruism, or dutiful altruism. "When defined broadly, as helping behavior not motivated by the promise of reward or the threat of punishment, altruism is something that can be and often is motivated by love, or by some dilute form of it such as compassion or sympathy."[28] Persons motivated by this quality to act in accordance with certain norms—norms that exist to benefit others—are doing so for a very different reasons than when they comply with those same norms because of political or economic stimuli. If law, politics, and economics are distinct disciplines, then we would say that a system of motivation without (or with less) coercive sanction (power), or economic costs or benefit (economics), is more *legal*.

This higher degree of civic quality would differ from the autonomous neo-liberal subjects that might be the subjects of a Rawlsian state. If we take Rawls's difference principle as an example,[29] a self-interested person possessed of sufficient reason, in the original position, would accede to the principle knowing that they themselves might occupy the least advantaged socio-economic positions of society. But we can imagine persons so empathetic as to accede because they can internalize the perspective of others who might occupy those positions.[30] Such persons—our human angels—might promote a difference principle in law without fear of sanction or the need for material benefit.

Conceived of in this way, the entire spectrum of civic quality may be little more than degrees of both education and empathy. Law exists between persons, and susceptibility to it may be a matter of mentally positioning oneself to experience others' understandings and interests. While we may assume that any legal system must be made up of rules backed by coercion or material benefit and deprivation because that is the way it is today, empathy (a phenomenon that exists to "expand understanding of others") remains a distinct and prominent part of legality.[31] As a normative, and not descriptive, proposition, we can say that whatever the role of power and economics in legal systems today, we *ought* to create systems in the future—by creating the people that comprise them—which are more legal than political or economic, because they are systems of persons that comply with norms without any associated coercive sanctions, or economic costs or benefits.

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[28] *See* Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1658-663 (1998).

[29] *See* RAWLS, *supra* note 24, at 99. The principle, stated crudely, allows inequalities in the distribution of goods in a given society only if the inequalities benefit the members of that society who are worst off.

[30] Thomas Nagle refers to altruistic motivation as the "recognition of the desires and interests of others, and requires no desires in the agent except those that are motivated by that recognition." THOMAS NAGLE, THE VIEW FROM NOWHERE 151 (1986) (citation omitted). "[P]ain, though it comes attached to a person and his individual perspective, is just as clearly hateful to the objective self as to the subjective individual. . . . The pain can be detached in thought from the fact that it is mine without losing any of its dreadfulness." *Id.* at 160.

But the key point of all of this, for purposes of describing antecedent law, is that for law to exist, the people present must have at least some minimum civic qualities such that they are made susceptible to it. [32] The law needs people to be made in certain ways.

Civic quality, so understood, like presence in the polity, can be determined by law. As we begin to move up the spectrum, education law plays an obvious role. "These qualities do not simply arise in citizens spontaneously, but require nurture,"[33] though the educational process by which they are instilled (what might be called a nurture-based form of social engineering) is hotly contested as a matter of political theory and constitutional law.[34] Education law plays a central role in antecedent law because, while it normally does not determine whether persons enter the polity,[35] it can determine the circumstances (relative to susceptibility to law) in which they enter. Imagine, for example, a state with a written system of laws that vigorously promotes childbearing, and the result of applying those policies in communities in which the children are never taught to read. Had the state used education law to alter those communities' educational systems, the persons born into them would relate to that state's laws in a different way than had the state not done so.

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[31] Lynne N. Henderson, *Legality and Empathy,* 85 MICH. L. REV. 1574, 1576, 1578 (1987) ("This article rejects the assumption that legality—by which I mean the dominant belief system about the Rule and role of Law—and empathy are mutually exclusive concepts.").

[32] *See, e.g.*, FINNIS, *supra* note 4, at 262 (referring to the "need of almost every member of society to be taught what the requirements of the law—the common path for pursuing the common good—actually are"); HART, *supra* note 1, at 189 ("unless certain physical, psychological, or economic conditions are satisfied . . . no system of laws or code of morals can be established"); THOMAS HOBBES, LEVIATHAN 220 (Edwin Curley ed., Hackett Publ'g Co. 1994) (1651) (noting that it is against the duty of the sovereign "to let the people be ignorant, or misinformed of the *grounds, and reasons* of those his essential rights . . . . [A law] is not (as a civil law) any obligation but by virtue only of the law of nature, that forbiddeth the violation of faith; which natural obligation if men know not, they cannot know the right of any law the sovereign maketh. And for the punishment, they take it but for an act of hostility . . . ." (emphasis added)). Rawls, referring to the reasonable, free, and equal people that comprise his ideal polity, says that "basic institutions must educate them to this conception of themselves." RAWLS, *supra* note 24, at 56.

[33] Eichner, *supra* note 23, at 1341; *see also id.* at 1340 n.8 (referring to the need for people of "'sufficiently high quality'" in democracies (quoting JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 290 (1950))).

But there is another role education, and education law, plays with regard to the notion of antecedent law. The existence of education law, or the legal requirement that persons be educated during that phase between incomplete personhood (the age of minority) and complete personhood, proves the existence antecedent law today. Education law "makes" people because they are not fully admitted into, or present in, the polity until they have gone through the phase—minority—during which we presume they are being educated. If this phase were not required, we would admit minors as complete members of the polity, to vote, serve in the military, hold office, etc. But instead we require that they go through a phase in which they are presumed to be educated. This is a drawn-out period of entrance into the polity, in which education law makes the person who will be admitted. Age here is only an indicator that the person lacks some requisite quality to be permitted to fully join the polity. For Locke, persons that were not actually educated were not necessarily ever made full members of the polity.[36]

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[34] *See generally* Eichner, *supra* note 23 (developing a framework to balance the needs of the particular state, parents, children and liberal democracies generally in controlling students' education in the public schools and the development of the "civic virtues").

[35] *Compare* Locke's focus on children actually obtaining reason prior to joining society, *see* JOHN LOCKE, THE TWO TREATISES OF GOVERNMENT 309 (Peter Laslett ed., Cambridge Univ. Press 2003) (1690) (using the term "may" when discussing whether, with age, children will have sufficient reason), *and id.* (referring to care "as long as they should need to be under it"), *with* the more simplistic and presumptuous focus on student's age in *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

In addition to education law, laws that can determine procreation or immigration can also determine some form of civic quality by determining the circumstances into which we are born,[37] or the civic qualities that one must have when he or she is allowed to immigrate.[38] Consider cases in which courts have chosen to issue no-procreation probation orders, rather than no-custody probation orders, to recidivist neglectful and/or abusive parents who are adjudged, usually by family courts, to be legally unfit as parents.[39] No-custody orders usually mean that any future child is born into state custody, and as such, he or she will be more likely to commit crimes than the average child. Children in foster care are sixty-seven times more likely to be arrested than children outside of foster care.[40]

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[36] *Id.*

[37] Rawls refers to the family's role in "the orderly production and reproduction of society" of "raising and caring for children, ensuring their moral development and education into the wider culture." RAWLS, *supra* note 24, at 162-63. Families must "fulfill these tasks effectively." *Id.* at 163; *see also* GARY STANLEY BECKER, A TREATISE ON THE FAMILY 147 (2d ed. 1991) ("[T]he interaction between quantity and quality explains why the education of children, for instance, depends closely on the number of children . . . ."); Susan J. G. Alexander, *A Fairer Hand: Why Courts Must Recognize the Value of a Child's Companionship*, 8 T.M. COOLEY L. REV. 273, 302 (1991) ("[W]hen people have fewer children, the value of each individual child increases enormously. Parents are willing to spend more on each child, e.g., by investing more in each child's training.").

[38] *See, e.g.*, Brian C. Harms, *Redefining "Crimes of Moral Turpitude": A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 263 (2001) (discussing various bars to admission of non-citizens, including refusal of an alien's admission into the U.S. for admitting having committed the essential elements of a crime of moral turpitude).

[39] *See generally* Carter J. Dillard, *Child Welfare and Future Persons*, 43 GA. L. REV. 367, 374 (2007).

[40] *See id.* at 374 n.21; Santosky v. Kramer, 455 U.S. 745, 789 (Rhenquist J., dissenting) ("It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens. The same can be said of children who, though not physically or emotionally abused, are passed from one foster home to another with no constancy of love, trust, or discipline."). Consider John Stuart Mill's take on the circumstances one is born into:

> Capacity for other nobler feelings is in most natures a very tender plant, easily killed, not only by hostile influences, but by mere want of sustenance; and in the majority of young persons it speedily dies away if the occupations to which their position in life has devoted them, and the society into which it has thrown them, are not favorable to keeping that higher capacity in exercise.

Matters that seem to be about education may also be seen as matters of procreation. In *Wisconsin v. Yoder*[41] the Court held that Amish children could not be placed under compulsory education past the eighth grade, focusing on the minimum education one needs to participate as a citizen of the United States. But that issue arose only because the children at issue were *first* born into the Amish community; that is, born under the legal permission of a broad constitutional right to procreate.

Note that there may also be some relation between the number of citizens antecedent law creates and the civic quality they will possess; that is, the number of citizens a given state with limited resources can produce while maintaining a certain level of civic quality in them. Using the distinction above, between legal persons on the one hand and political and economic persons on the other, we can imagine that a state might have to spend different levels of resources on a given citizen to make him or her merely responsive to coercion or material incentives—the stick and carrot so to speak—than the state would have to spend to create citizens disposed to comply with legal norms without *any* associated coercive sanctions, or economic costs or benefits. These latter "angels," as Raz calls them, [42] may require significantly more resources, and as such the state would be able to make far less of them in a given generation. In other words, there may well be an inverse relation—as there is in making many things—between quality and quantity.

As an interesting aside, we might view criminal law, with its use of incarceration and subsequent disenfranchisement (altering one's presence in the polity),[43] as well as its rehabilitation

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JOHN STUART MILL, UTILITARIANISM 10 (George Sher ed., 2d ed., Hackett 2001) (1863); *see also id.* at 14 ("Genuine private affections and a sincere interest in the public good are possible, though in unequal degrees, to every rightly brought up human being.").

[41] 406 U.S. 205 (1972).

[42] RAZ, *supra* note 4, at 159.

[43] *See* Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019, 1028 (2004) ("The creation of a criminal caste leads to permanent ostracization. Modern penal law is often purposefully used as a method of stigmatizing and separating offenders."). Professor Yankah objects to the political ostracization of criminals based on assessments of their character, arguing that political equality precedes moral merit and proposing a purely act-based theory instead. *See id.* at 1043-63. Antecedent law would make assessments before a prospective child, or intending immigrant "arrives" in the

motive (rehabilitating towards some level of civic quality),[44] as a failing attempt to impose antecedent law post hoc. We temporarily, or in the case of the death penalty, permanently, exclude persons from the polity who lack the minimum civic qualities presence requires. It is a failing attempt because the harm done from the crime committed may be irreparable.

A. Antecedent Law Already at Work

Antecedent law is not as strange as it might seem. Every polity has law which deeply influences the procreation of its members (behavior that, per Posner, determines "the size and quality of the population.")[45] The state's influence in these matters is especially visible in the Peoples Republic of China, for example, where the complex, and often misunderstood, family planning policies have dramatically changed its population's "quantity (slowing growth and limiting size) and its 'quality' (enhancing not only health and education but also social morality and political commitment)."[46] In these policies state regula-

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polity, and hence it and its assessments precede their political equality. More importantly, the substantive antecedent law suggested here might actually promote de facto equality, at least in terms of civic quality, by seeking a minimum level for all new entrants to the polity.

[44] *See* FINNIS, *supra* note 4, at 264 (referring to criminal law, he states, "[I]t may work to restore reasonable personality in the offender, reforming him for the sake not only of others but of himself . . . .").

[45] RICHARD A. POSNER, SEX AND REASON 187 (1992).

[46] SUSAN GREENHALGH & EDWIN A. WINCKLER, GOVERNING CHINA'S POPULATION: FROM LENINIST TO NEOLIBERAL BIOPOLITICS 1-2 (2005); *see also* INFORMATION OFFICE OF THE STATE COUNCIL OF THE PEOPLES REPUBLIC OF CHINA, HUMAN RIGHTS IN CHINA: FAMILY PLANNING AND PROTECTION OF HUMAN RIGHTS (Nov. 1991), *available at* http://www.china.org.cn/e-white/7/7-VIII.htm ("The Chinese government implements a family planning policy in the light of the Constitution, with the aim of promoting economic and social development, raising people's living standards, enhancing the quality of its population and safeguarding the people's rights to enjoy a better life."); Xizhe Peng, *Population Policy and Program in China: Challenge and Prospective*, 35 TEX. INT'L L.J. 51, 54 (2000) ("China's population program is designed to maintain an optimal population size, high population quality, and proper population structure. Curbing China's rapid population growth not only benefits Chinese people, but also contributes to stabilization of the world population and promotes sustainable development of human beings."). Greenhalgh and Winckler discuss the historic shift from restricting quantity to promoting quality as a norm, with a focus on health and education, and a trend of creating "autonomous" neo-liberal subjects assumed by the liberal state, GREENHALGH, *supra* at 217, or "neo-liberal subjects par excellence." *Id.* at 236.

tion of people-making is explicit, and concern for quality limits quantity in part because educational resources are finite.[47]

State regulation may be less obvious in the United States, but it is still present. In *Meyer v. Nebraska*,[48] the Court said that "the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally."[49] Later, in upholding limits on public assistance to families, the Court found that classification based on "family size" "neither impinged upon a fundamental constitutional right nor employed an inherently suspect criterion."[50] Justice Powell once opined that some "intentional governmental effort[s] to 'penalize' childbearing" are constitutional.[51] Recently state courts have successfully issued no-procreation orders to abusive and neglectful parents.[52] Consider that, at the same time, when liberal states recognize and protect a broad procreative right they are also creating the persons among whom the law will exist.

Thus, when states decide to give a tax credit to promote childbearing or charge a fee to discourage it, legalize or ban abortion, promote or prevent certain forms of immigration, provide funding for higher education or leave the whole matter to parents, they make a choice that can determine the presence, number, and susceptibility to law (or civic quality) of persons within their borders—and those of generations to come.[53] And, it seems that legal scholars and courts—perhaps limited by a concept of law that seems to ignore the role law plays in the creation and quality of those it seeks to regulate—have largely overlooked this fact.[54]

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[47] *See supra* note 46; *see also* BECKER, *supra* note 37 at 147 ("[T]he interaction between quantity and quality explains why the education of children, for instance, depends closely on the number of children . . . .").

[48] 262 U.S. 390 (1923).

[49] *Id.* at 401. *Meyer* has been called a foundation case "for an entire constitutional theory of family." Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 997 (1992).

[50] Graham v. Richardson, 403 U.S. 365, 376 (1971) (citing Dandridge v. Williams, 397 U.S. 471 (1970)).

[51] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 651-52 (1974) (Powell, J., concurring) (citing *Dandridge*, 397 U.S. 471). John Rawls argued that "principles of justice . . . impose constraints on the family on behalf of children who are society's future citizens and have claims as such." RAWLS, *supra* note 24, at 165.

[52] *See* Dillard, *supra* note 39 and accompanying text.

[53] How, and to what degree, recent public policies have affected things like fertility and educational attainment is far from certain, *see infra* note 80, and some scholars doubt the ability of law to significantly change these things. *See* Larry D. Barnett, *The Regulation of Mutual Fund Boards of Directors: Financial Protection or Social Productivity?*, 16 J.L. & POL'Y 489, 529 (2008).

B. Advantages of Antecedent Law

Thinking about our existing forms of law as divided into law and antecedent law has practical advantages. First, if we ignore the role law plays in determining how people come to be present in a polity, and through determining the circumstances of their entry, also whether they possess civic quality, we take much for granted and consequently miss an important part of how law operates. For example, a lawyer asked to devise a policy to curb anthropogenic greenhouse gas emissions might present options for polity members to alter their behavior in certain ways. But she might not consider whether the legal system fostered population growth in a way that contributed to the problem,[55] and whether the legal system is busy making people who are not likely to alter their behavior when limits are enacted. She might not consider whether the law played a role in creating the existing basic state of legal affairs (people causing problems and their level of willingness to alter their behavior), and whether the law can create a different basic state of legal affairs at some point in the future.[56]

Likewise, a lawyer or legislator faced with growing civil strife over the price of fossil fuels might look for ways to change the law in order to increase supply. But she might not question the ever-growing number of users who are creating the demand (quantity), or consider that some users—born or immigrating under particular circumstances—might have already begun voluntarily reducing their personal demand in the interest of the polity as a whole (quality).[57]

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[54] *See, e.g.*, Pierce, *supra* note 17, at 109 ("[C]ourts speak of the 'naturalness' or 'inevitability' of population growth in the same way one might speak of the naturalness or inevitability of death.") There are of course exceptions. *See generally* 1 POPULATION AND LAW (Luke T. Lee & Arthur Larson eds., 1971).

[55] *See, e.g.*, Arnold W. Reitze, Jr., *Air Quality Protection Using State Implementation Plans -- Thirty-Seven Years of Increasing Complexity*, 15 VILL. ENVTL. L.J. 209, 359-60 (2004) (attributing the failure of states to attain the goals of the Clean Air Act in large part to population increases, which nullified "much of the progress made under the Clean Air Act").

[56] For a discussion of law, population, and climate change see JOHN FIROR & JUDITH E. JACOBSEN, THE CROWDED GREENHOUSE: POPULATION, CLIMATE CHANGE, AND CREATING A SUSTAINABLE WORLD 91-94 (2002).

A second advantage is that crystallizing antecedent law as a type of law allows us to separate its form from its possible content—including odious content (like eugenics), which could otherwise be confused with the form and might lead us (and may have led us historically) to reject the form entirely. A state can regulate the quality and size of its population without practicing eugenics. Any analysis that makes separating form and content difficult, or leads states to ignore the quality and size of its population altogether, has serious flaws. It overlooks a critical perspective on the seemingly private issues, like procreation and the education of our children, which will determine the polity for us and for future generations.

For example, Part II of this article argues for a substantive antecedent law that seeks to promote civic quality and an optimal population range as a means of maximizing autonomy. Rejecting all of antecedent law, because we conflate it with eugenics or for any other reason, leads us to avoid ever experimenting with such an approach.

Another advantage in grouping existing areas of law, like population or immigration law, under one form is that these areas of law tend to share a particular breed of heated controversy that concerns the legal status of those to whom they pertain, i.e. whether a fetus is a person or an undocumented worker is "illegal."[58] A form of law focused on the creation or presence of people and their susceptibility to law may help reframe the debates around the common, and perhaps most compelling, interest: determining with whom we are in the polity.

Having described the form antecedent law, seen that it exists in the forms of law it groups together, and noted some of its advantages, we can now distinguish it from other forms of law. But it will help to first make two observations.

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[57] As discussed in Part III.C., each polity has sub-groups which benefit from avoiding antecedent law approaches.

[58] Note that education law does not seem to raise this particular controversy, but that is probably because we do not view students as outside of the polity. However, there is no reason why that must be the case. *See supra* note 33 and accompanying text.

It is possible that people will find something objectionable about the form itself; something less easily articulated than the specific counter-arguments discussed in Part III. It could be that we tend to resist aggregating individual acts of procreation or immigration and thereby obscure their public nature, such that it is difficult to see beyond the wants and desires of any one particular prospective parent or intending immigrant. It could be that the relatively recent history of eugenics and social engineering by totalitarian regimes casts its shadow so broadly as to preclude viewing other persons, and through them the law, as playing a role in determining our existence and basic qualities. It could also be that we view the new presence of any human life as valuable in and of itself, regardless of civic quality. Unlike murder, the average act of procreation was probably (though perhaps no longer is) beneficial to our species' domination. Moreover, for lawyers resistant to the idea of antecedent law, it could be difficult to consider that the greatest influence we can exert on the world is not through the coordination and constraint of extant persons, but by replacing the persons in our polity.

That said, it is worth noting, and a bit ironic, that this discourse (like virtually all focused discourses involving legal and political theory) occurs in a world shaped primarily by something like antecedent law: academia. Academia is, after all, based on a process of determining presence through admission and exclusion along a baseline very much like the baseline of civic quality described above.

Academic discourse occurs only *after* a common core competency has been established and maintained among a limited population, optimal in number (the number of students admitted), which is achieved by employing the antecedent law model. And, "university law" is not just about admission of persons capable of reasoning along the upper ranges of the spectrum,[59] it also seeks to exclude students with disciplinary records, or those incapable of composing themselves in a manner conducive to the beginnings of a well ordered society, much the like the one

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[59] Hobbes notes that "the Universities are the fountains of civil, and moral doctrine." HOBBES, *supra* note 32, at 496; *see also id.* at 225.

Rawls describes. Arguably, university law tracks the civic quality spectrum described above, from the requirement that all conform their behavior to the basic code of conduct, to promoting more selfless, empathetic, and altruistic behavior to benefit the community (for example, by requiring pro bono service as a prerequisite to graduation).

Arguably the focused political and legal discourse did not retreat to the universities because they are voluntary associations in Rawlsian sense, but because the minimum level of education and civic quality necessary to sustain it does not exist in society at large. Should we apply the non-antecedent law model to the universities and hope to achieve the same goals, or apply the academic model to society? If the former, law professors may wish to open their classes to the general public—who as we know are presumed to know the law regardless and are at serious risk if they do not.[60]

C. Antecedent Law's Unique Role for the Polity

With these points in mind, we can identify antecedent law's unique role for the polity by heuristically using four concepts: the social contract, legal realism, the dissolution of civil society, and a particular empirical view of any given polity.

1. The Social Contract

Stated crudely, social contract theory views the polity from the perspective of people who have (or would) come together to form a contract or agreement, consenting to being made subject to the power of others in exchange for certain benefits. But, as in our account of law, there may be something missing. How does this picture account for the birth of persons within the polity, that is, how does it account for extant parties consenting to the addition of these new parties to the contract? Certainly something like Locke's tacit consent, i.e., choosing to remain in a polity, explains how *they*, the new members, come to agree,[61] but the concept does not immediately capture how the extant members agree to these new members joining, or becoming present.[62] While the ethical or political concept of a social contract is something quite different from the concept of a modern juridical contract, it makes little sense to use the concept at all if we are going suggest that it is irrelevant who is allowed to join as a party, or how many new members are allowed to become parties.

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[60] *See, e.g.*, Dan M. Kahan, *Ignorance of Law Is an Excuse -- But Only for the Virtuous*, 96 MICH. L. REV. 127 (1997).

Regulating who is or becomes a party to the social contract may be more important than the terms of that contract. The terms are of little value if the other parties cannot or will not comply, or be held accountable for failing to do so. Certainly, an individual's willingness to enter a contract is determined not only by its terms, but also depends significantly on with *whom* exactly the individual is contracting and the likelihood that the second person will follow through or compensate the first for their failure to do so. In this way, a concept of law and of a social contract that pays no special attention to the addition of new parties—to who they are or their civic quality—seems incomplete, especially in a democracy. Under Hobbes's absolute sovereign, we might care very little about other parties because our fate will be primarily in the hands of the sovereign, not the other parties. But under a participatory government, we are likely to care significantly more about regulating the parties, since we are subject to our fellow contractors and their failings.

Of course, while granting individual consent to each new member would be impossible, granting consent using agreed-upon standards for admission would not. Such standards already comprise the substance of antecedent law, as in the case of immigration laws.[63] But again, traditional forms of law and social contract theory take no *special* notice of this, or of the role procreation plays here—special, that is—in terms of treating the matter as of antecedently unique importance to members of the polity.[64]

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[61] For a discussion on the lack of consent by prospective children to their birth, see Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 LEGAL THEORY 117, 123-24 (1999).

[62] Of course, some scholars have taken the perspective of current members and their willingness to admit and enter into contract with others, in some case with those who may be disabled or of another species. *See, e.g.*, MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP (2006). But what if the prospective members are not disabled or of another species, but will simply lack some sort of minimum civic quality?

The social contract construct also accentuates the importance of the actual *number* of new contract parties. Given the increasing global concern over the environment, it is no surprise that contemporary political scientists display renewed concern with issues of "world ownership," that is, the claim each person has to a share of the world's natural resources.[65] This renewed concern emphasizes the importance of access to resources, a matter which has long been considered by social theorists. Both Hobbes and Locke viewed increasing population and the resulting competition for scarce resources, or as Locke put it, the "quarrels and contentions," as the reason that persons felt the need for government[66] and as a possible threat to that government's

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[63] Contrast this with the constructive consent of the new parties themselves. *See, e.g.*, John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 384 (1991) ("[T]he procreative right arguably is contingent upon the constructive consent of the resulting child.").

[64] Though it is beyond the scope of this article, one natural result of the law not focusing specifically on that which determines the creation of persons, and their civic quality, or on providing a vehicle of consent, would be that it leads society to treat the new entrants as less than full members of the polity. For example, if a person refuses to agree to a political relationship with another, the second is stranger to the first than if the first had agreed. The second has forced himself on the first.

[65] For a thorough examination of the competing perspectives see, for example, LEFT-LIBERTARIANISM AND ITS CRITICS: THE CONTEMPORARY DEBATE (Peter Vallentyne & Hillel Steiner eds., 2000); MICHAEL OTSUKA, LIBERTARIANISM WITHOUT INEQUALITY (2003).

[66] For Locke natural liberty is first challenged by the growing presence of others, as before that growth "there could be then little room for quarrels or contentions about property so established. . . . Nor was this appropriation . . . any prejudice to any other Man, since there was still enough, and as good left; and more than the yet unprovided could use." LOCKE, *supra* note 35, at 290. For Hobbes, the first of the "three principle causes of quarrels" is "competition" which is the natural state of "men in multitudes." HOBBES, *supra* note 32, at 76, 99; *see also* HART, *supra* note 1, at 96.

Society can improve resources to partially compensate for the problem, but this is not a complete solution. Hume refers to the possessions one can acquire, but explains that "there is not a sufficient quantity of them to supply every one's desires and necessities. As the improvement, therefore, of these goods is the chief advantage of society, so the *instability* of their possession, along with their *scarcity*, is the chief impediment." DAVID HUME, MORAL PHILOSOPHY 89 (Geoffrey Sayre-McCord ed., Hackett 2006). And stability in the future.[67] If we apply the social contract construct to these issues, then arguably each contractor competes for scarce resources according to the terms of the contract. In this system, new competitors are necessarily of concern, perhaps of compelling interest, to existing (and future) competitors. At the very least, the addition of each new competitor may well reduce the share of resources each existing competitors can claim.[68]

To some extent this simple fact is at the heart of the debate today over negative and positive rights—especially for those who think that rights are essentially about property.[69] Many positive-rights theories are grounded on the moral claim that each new person needs (has a claim to) a certain bare minimum of property in order to survive, and that this claim defeats others' competing claims to continued ownership of the relevant property through labor and acquisition.[70] How is it possible to ignore the role played by the addition of new claimants to the picture?

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so, "'tis only from the selfishness and confin'd generosity of men, along with the scanty provision nature has made for his wants, that justice derives its origin." *Id.* at 84.

[67] *See* HOBBES, *supra* note 32, at 228-29:

> The multitude of poor (and yet strong) people still increasing, they are to be transplanted into countries not sufficiently inhabited; where nevertheless they are not to exterminate those they find there; but constrain them to inhabit closer together, and not range a great deal of ground to snatch what they find, but to court each little plot with art and labour, to give them their sustenance in due season. And when all the world is overcharged with inhabitants, then the last remedy of all is war, which provideth for every man, by victory or death.

It is worth considering whether some sort of provisional antecedent natural law which ensured few people with high pre-civic qualities (peaceful and reasonable as opposed to violent and unreasonable) would have prevented the need for a social contract. That law might simply be something like practical reasonableness. *See* FINNIS, *supra* note 4, at 251; HOBBES, *supra* note 32, at 174 ("The law of nature and the civil law contain each other, and are of equal extent.")

[68] Of course there is an economic counterargument that additional members can actually increase (improve) the value of the society's resources. That argument will not be addressed here, but suffice it to say that it generally presumes a lot about relative value, does not account for claims to unappropriated resources (and resources not subject to appropriation), and does not account for the fact that the type of claims each person has (as opposed to their relative value) would be altered by the addition of new competitors.

[69] *See, e.g.*, HILLEL STEINER, AN ESSAY ON RIGHTS 93 (1994).

[70] For an influential account of such a right, see JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988).

When modern contract theorists like Rawls abstract from Hobbes and Locke, they push into the background the role that nature—and the scarcity of natural resources caused by human proliferation and increased competition[71]—played in the formation of the social contract construct.

2. Legal Realism

One of the most significant contributions legal realism (and later, Critical Legal Studies) makes to the concept of law[72] is the suggestion that for judges, rules are not the primary determinant of legal outcomes.[73] If this is so, then it seems logical to assume that formal law or rules may play little or no role in the day-to-day decisions (whether to steal, pollute, etc.) of the average person, who, unlike a judge, has no legal training and very limited knowledge of the law that might apply to his/her conduct.[74] Therefore, we should probably care more about who joins our contract (at least with regard to the civic qualities higher on the spectrum) and according to what law that is determined, than we care about the contract's formal rules of conduct, which, according to legal realism, have only limited impact. Antecedent law becomes more relevant as the efficacy of traditional, or formal, law declines.

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[71] *See* JAMES TULLY, AN APPROACH TO POLITICAL PHILOSOPHY: LOCKE IN CONTEXTS 35 (1993) (discussing population as a factor in the formation of society).

[72] For a well-known critique of legal realism, see HART, *supra* note 1, at 143-147, and DWORKIN, *supra* note 4, at 36-37.

[73] *See, e.g.*, Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267 (1997).

[74] *See, e.g.*, Scott Burris et al., *Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial*, 39 ARIZ. ST. L.J. 467, 468 (2007) ("We failed to refute the null hypothesis that criminal law has no influence on sexual risk behavior."); Edward K. Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100 NW. U. L. REV. 655, 656 n.5 ("'[I]n many contexts, proliferation of rules means proliferation of lawlessness; the rules may be too numerous and complex for normal people to master.'" (quoting Stephen Williams, *The More Law, the Less Rule of Law*, 2 GREEN BAG 2D 403, 405 (1999))). "In the Robinson and Darley study, respondents were asked about their knowledge of various legal rules, such as the duty to report a crime, etc. Interestingly, the distribution of responses was unaffected by the actual rule in the respondents' home state." *Id.* at 259 n.11 (citing Paul H. Robinson & John M. Darley, *Does Criminal Law Deter?: A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173 (2004)). Note too that "it is important not to take the mere fact that the population by and large conforms to the law as evidence that it accepts it and guides its behavior by it." RAZ, *supra* note 4, at 125. Raz notes that people may coincidentally conform their behavior to the law while being totally unaware of it, or even being opposed to it. *See id.* He focuses on law enforcing institutions as a test for what norms are part of a legal system and whether a system is in force, which raises the image of a populace largely ignorant of the law until it is too late.

Even Hart, legal realism's harshest critic, notes the importance of susceptibility to law and the nuances of what *law* in this context might mean. This is clear, for example, in his discussion of the "rational connection between natural facts and the content of legal and moral rules;"[75] his reference to "certain physical, psychological, or economic conditions" that must be satisfied before any "system of laws or code of morals can be established;"[76] and his recognition that only those laws that conform to a certain type can function successfully. Advances in social sciences since Hart wrote in the 1950s have more firmly established this point. Scholars like Donald Braman, Dan Kahan, and Larry Barnett have empirically demonstrated that formal law plays a smaller role among citizens than their individual qualities and attributes,[77] many of which are determined by the circumstances in which those citizens enter the polity.

Thus, to the extent formal law does not guide behavior, that aspect of law which creates citizens and determines their civic quality will fill the gap. Just as antecedent law focuses on the civic qualities of immigrants[78] (rather than simply relying on the effect of non-antecedent laws once the person arrives), it also determines presence and civic quality by regulating education and by encouraging or discouraging procreation—with substantial consequence for others.[79] This does not require empirical evidence and inductive reasoning to understand. Indeed Hart seems to deduce at least a minimum set of requisite conditions in the quote above.

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[75] HART, *supra* note 1, at 193.

[76] *Id.* at 193-94.

[77] *See, e.g.*, LARRY D. BARNETT, LEGAL CONSTRUCT, SOCIAL CONCEPT: A MACROSOCIOBIOLOGICAL PERSPECTIVE ON LAW (1993) (demonstrating that law is not the dominant cause of social change, but is primarily reactive to it); Barnett, *supra* note 53, at 528-31; Donald Braman & Dan M. Kahan, *Legal Realism as Psychological and Cultural (Not Political) Realism*, *in* HOW LAW KNOWS 93, 93-115 (Austin Sarat et al. eds., 2007) (laying "the groundwork for a mode of political and legal analysis that is cognizant of the influence of cultural cognition"); Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115 (2007) (challenging the notion that citizens in a liberal state *can* cognize secular, harm-based laws without wrongfully imputing certain consequences based on their cultural biases); Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149 (2006) (finding epistemic origins for political conflict in citizens' cultural cognition, or tendency to filter legal and political perceptions through pre-existing cultural values). *But see* Bilz, *supra* note 10, at 102 ("[I]t is possible, even likely, that the forces operating between law and morality are bidirectional. Still, it is worth thinking about whether, and when, the causation will run as an initial matter in one direction versus the other.").

[78] *See supra* notes 21 & 53 and accompanying text.

It may seem that legal realism undercuts not only formal law, but also antecedent law: Why would antecedent law be any more effective than formal law in guiding behavior?[80] However, legal realism undercuts only those antecedent laws that are formalistic in nature. In contrast, there could be antecedent laws that determine the circumstances under which people become present in a given legal system by creating effective social norms, e.g., when it is the "right" time to have a child. Perhaps this is the type of antecedent law that would have to be pursued.[81] Indeed, "[i]t is useful to distinguish between the law's ability to shape behavior through simple reward and punishment (the skeptical view), and its ability to use indirect, subtle, and sophisticated techniques to shape, not only behaviors, but also normative commitments."[82]

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[79] *See generally* Dillard, *supra* note 39; James J. Heckman & Dimitriy V. Masterov, *The Productivity Argument for Investing in Young Children*, 29 REV. AGRIC. ECON. 446 (2007); Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-reports*, 94 AMER. ECON. REV. 155 (2004). For example, "[i]t is now well established that education reduces crime." Heckman, *supra* at 454. "Poorly educated teenage mothers in low-income families are much more likely to produce children who participate in crime." *Id.* at 455. "Some of the most convincing estimates of the impact of adverse early environments on participation in crime come from interventions designed to remedy those environments." *Id.* at 456. Also,

> [m]ost scholars recognize that absence of a father, low levels of financial resources, low parental education and ability, a lack of cognitive and emotional stimulation, and poor parenting skills are characteristics of adverse environments. Determining the relative importance of these factors is an ongoing debate. Each seems to play a factor in affecting child outcomes.

Id. at 460. "The growth of adverse childhood environments explains a substantial part of the problems of schools, skills and crime in American society." *Id.* at 466. "Ability formed in the early years is also important in explaining crime, teenage pregnancy, and a variety of social pathologies." *Id.* at 469. "The social science literature establishes that both cognitive and noncognitive abilities affect schooling attainment, participation in welfare, teenage pregnancy, and crime . . . . More able and engaged parents produce more able children." *Id.* "Redirecting funds toward the early years is a sound investment in the productivity and safety of American society, and also removes a powerful source of inequality." *Id.* at 488.

[80] Indeed, consistent with Barnett's view of the law, there is a dearth of empirical evidence that policies to date have influenced procreation, or even educational attainment levels. *See, e.g.*, Barnett, *supra* note 53, at 529 ("As an example of government regulation directed at activity that is largely social in nature, state statutes requiring minors to attend school until they reach a specified age have generally not had a material impact on the school enrollment rates of minors."); Anne H. Gauthier, *The Impact of Family Policies on Fertility in Industrialized Countries: A Review of the Literature*, 26 POPULATION RESOURCES & POL'Y REV. 323, 342 (2007) (though reviewing a narrow range of policies intended to affect fertility, Gauthier found "the impact tends to be small and also to vary highly depending on the type of data used and on the type of policies."). *But see* Gu Baochang et al., *China's Local and National Fertility Policies at the End of the Twentieth Century*, 33 POPULATION. & DEV. REV. 129, 145 (2007) (finding that "government mandated fertility and achieved fertility have converged in China"). But this article does not try to inductively establish a particular influence, or level of influence, law has on the subjects of antecedent law as much as it deductively treats those subjects as conceptually distinguishable from other forms of law and involving specialized state interests. The initial hurdle for antecedent law is not empirical evi-

3. The Dissolution of Civil Society

Both Hobbes and Locke contemplated that a society formed by social contract could possibly dissolve back into the individu-

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dence, but taboo. Indeed, the tendency of traditional forms to shuttle antecedent law into the background may explain why we have not studied it and made it more effective.

[81] This would be especially relevant to procreation. For example, Jean Cohen has argued for a reflexive law approach when regulating conduct perceived to be intimate. *See* JEAN L. CODEN, REGULATING INTIMACY: NEW LEGAL PARADIGM (2002). Dan Kahan has noted the problem of "sticky norms." Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607-09 (2000) ("My concern in this Article is with the 'sticky norms problem.' This problem occurs when the prevalence of a social norm makes decisionmakers reluctant to carry out a law intended to change that norm. . . . Some might conclude from the 'sticky norms problem' that the law is a relatively ineffective instrument for changing norms. . . . In short, norms stick when lawmakers try to change them with 'hard shoves' but yield when lawmakers apply 'gentle nudges.'"); *see also* HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 732 (3d ed. 2008) ("Under the acculturation approach, power is undertstood as productive, cultural, and diffuse—not merely prohibitory, material and centralized." (quoting Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 695 (2004))). Bilz, *supra* note 10, at 118 ("The lesson from the Prohibition era appears to be that the law can backfire if it extends its reach too far into activities that are perceived as morally acceptable."); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2025 (1996) ("I also argue that the expressive function of law makes most sense in connection with efforts to change norms . . . ."). All of this points to the fact that a no-procreation order of the sort discussed in the text accompanying note 108, *infra*, may be more influential as an expression to the community than as an basis for punishment.

[82] Bilz, *supra* note 10, at 104. Professor Barnett proposes a very specific view of how law benefits society irrespective of its influence on the incidence of the targeted behavior, namely law's ability to act as a symbol which increases societal cohesivness. *See* Barnett *supra* note 53, at 531, 534-37.

als that were formerly its constituents,[83] leaving "every man at liberty to protect himself by such courses as his own discretion shall suggest unto him."[84] In such a scenario—or even in a state of only relative anarchy, such as during a natural disaster—civic quality and our historic antecedent law (that which in the past determined who is now in the polity) become especially relevant.[85] The ability to reestablish a government, or even to maintain a Lockean civil society, would seemingly depend on the civic qualities of the persons around us—much as those qualities (or lack thereof) were relevant in our emergence from the state of nature. Similarly, the number of fellow contractors might also be of concern, as it affects competition for scarce resources and the ability of people to coordinate their efforts among themselves. One can imagine the difference between renegotiating terms of a contract to divide scarce resources as between a few hundred, or a few million, people.

4. Our Empirical View of the Polity

As discussed above, our traditional concept of law regulates extant people, taking their presence and civic quality as givens. Such a perspective of law engenders a view of the polity as an undifferentiated whole. Indeed, practically speaking, law is by nature general: the tort law of a given state is not expected to account for every citizen's idiosyncratic proclivities for negligent behavior. As lawyers, we focus on the rules and not the relevant capabilities of the ruled, which explains why antecedent law is generally overlooked. Although "the American people" figure frequently in legal and political discussions, little consideration is given to the number or quality of the individuals who comprise this people. Rather, "the American people" is a gestalt image of a unitary mass whose quantity or quality, in terms of specific attributes, is largely passed over.[86]

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[83] HOBBES, *supra* note 32, at 77 (referring to degeneration into civil war); *id.* at 210-19 (referring to the causes of the dissolution of commonwealth); *see also* LOCKE, *supra* note 35, at 211.

[84] HOBBES, *supra* note 32, at 219; LOCKE, *supra* note 35, at 211 ("[S]o every one return to the state he was in before, with a liberty to shift for himself, and provide for his own safety as he thinks fit in some other society."); *cf.* Joby Warrick, *CIA Chief Sees Unrest Rising With Population*, WASH. POST, May 1, 2008, at A15 (Referring to world population growth, Hayden said that "[m]ost of that growth will occur in countries least able to sustain it, a situation that will likely fuel instability and extremism, both in those countries and beyond.")

[85] This discussion suggests that the dissolution of society takes place at a specific moment in time. But there is no reason why it could not be a slow process that ebbs and flows in every state, moving from one relative state of dissolution to another.

Because legal theory embraces such an undifferentiated view, it tends incorrectly to institutionalize and thereby distort our perception of the polity. In a very real sense, a polity is the collection of its individual, constituent members,[87] the state and its laws being merely a useful social construct. As such, it is not static, but rather constantly evolving in tandem with the individuals within it. The proliferation and civic interaction of these individuals, and the law that can influence those processes must be of a particular interest. Yet, these issues are hardly central to our concept and practice of law.

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[86] We could, for example, evaluate any polity in the world simply by assessing the civic quality of its constituents, which would be very different from assessing polities based on military might or gross domestic product. *See infra* Part III.C. In that assessment the United States may not fare well at all. *See* Eichner, *supra* note 23, at 1364 (citing evidence that Americans lack the knowledge and critical ability to perpetuate institutions like free press, separation of church and state, and the rule of law). "'Throughout most of the twentieth century, voting rates in the United States were much lower than in almost all other advanced democracies.'" Steven L. Winter, *When Self-Governance is a Game*, 67 BROOK. L. REV. 1171, 1202 (2003) (quoting DEREK C. BOK, THE TROUBLE WITH GOVERNMENT 387 (2001)). The average American reads at just below the eighth-grade level, *see* Anita Bernstein, *Keep it Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss*, 48 ARIZ. L. REV. 773, 779 (2006), and there is strong empirical evidence that Americans cannot understand the law even when it is presented to them. *See generally* Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century,* 81 NOTRE DAME L. REV. 449 (2006). Complying with the law is a whole other matter. "The United States incarcerates more offenders per capita than any industrialized nation in the world: three times more than Israel, five times more than England, six times more than Australia and Canada, eight times more than France, and over twelve times more than Japan." Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47, 52 (2008) (footnote omitted).

[87] This truism largely underlies the emergence of the human rights movement.

> [T]he acknowledgement of the worth of human personality as the ultimate unit of all law . . . brings to mind the fact that, in international law as in the municipal sphere, the collective good is conditioned by the good of the individual human beings who comprise the collectivity. It denies, by cogent implication, that the corporate entity of the State is of a higher order than its component parts . . . .

Steiner et al., supra note 81, at 144 (quoting Hersch Lauterpacht, International Law and Human Rights 61 (1950)).

II. ONE VALUE ANTECEDENT LAW CAN PROMOTE: AUTONOMY

It is one thing to differentiate antecedent law from the more traditional forms of law in terms of its role for the polity. But why would members of a polity, and by extention the state, especially care about that which determines the presence and civic qualities of its members? What reasons would a state have for using antecedent law?

A. Narrowing the State's Interest

These questions raise the issue of what particular interest (and level of interest) a state has in antecedent law, and what "rarified values"[88] might underlie particular antecedent laws. Once articulated, these values could then be weighed against the values that might underlie rights, like the right to procreate, with which antecedent laws interfere. For example, the state's interest in or valuing of child welfare has been weighed against a parent's interest in exercising freedom of religion in the context of child rearing. [89] Note at the outset that the question of whether the state has any interest in antecedent law is itself controversial.[90]

When considering the particular interest a state has in the creation of new citizens, it will be vital to characterize the particular behaviors at issue correctly. For example, one way to articulate the state's interest would be to break antecedent law into its components, examining procreation for example, and to simply look at it in the way many courts have. For procreation, this would mean looking at the state's interest in the creation of human life per se, that is, exclusive of the state's interest in civic quality. Looking to laws that regulate contraception, abortion, fetal protection, and same-sex marriage, we would find that courts have identified compelling state interests in potential life and in vague notions of responsible procreation.[91] Done this way we would say that the state has an interest in ensuring that new members enter the polity.

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[88] J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 330-31 (1969).

[89] *See* Prince v. Massachusetts, 321 U.S. 158, 165 (1944) ("It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens.").

[90] *See, e.g.*, *Regulating Eugenics*, *supra* note 7.

But that interest does not adequately consider the context and circumstances into which a child is born, that is, the determinants of civic quality. It is dubious that the state has an interest in acontextual people-making—creating people irrespective of the circumstances in which they are born.

A state's interest in antecedent law might be different from its interest in antecedent law's individualized components, at least as courts have traditionally seen them. Focusing narrowly on the components of antecedent law in this way to find the underlying values misses the point of the form.[92] The form interests us only to the extent that it captures how law contributes to civic quality *through* the creation of those around us—that is, by determining the circumstances in which others become present. A state's stripped down interest in potential life per se—irrespective of the circumstances in which that life enters the polity—does not fully address how that life will affect our own.

B. Promoting Autonomy

Focusing then on that which determines the circumstances in which others become present in the polity, one value which antecedent law can promote is autonomy.[93] This is not to say that current laws in the United States or elsewhere that might fall under the antecedent law rubric do this. In fact it may be quite the opposite. My point is that antecedent law *can* promote autonomy. More specifically, antecedent law that seeks to promote civic quality and an optimal population range[94] tends to promote autonomy, perhaps more than traditional forms of law ever can.[95]

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[91] *See, e.g.,* Gonzalez v. Carhart, 127 S. Ct. 1610 (2007); Kenneth A. De Ville, *Fetal Protection in Wisconsin's Revised Child Abuse Law: Right Goal, Wrong Remedy*, 27 J. L. MED. & ETHICS 332 (1999) (discussing laws intended to protect fetuses from alcohol or drug exposure); Citizens for Equal Protection v. Bruning, 455 F.3d 859, 867-68 (8th Cir. 2006) (finding a state's purported interest in responsible procreation, in the context of a dispute over same-sex marriage, to be legitimate).

[92] Though admittedly, states can be interested in the number of new entrants irrespective of their civic quality. For example, though the PRC family policy focuses on improving the quality of the population, the original focus was on the number of new entrants regardless of the circumstances into which each arrived. *See* GREENHALGH, supra note 46, at 217. Likewise, though U.S. immigration system bars admission based on what it perceives to be civic quality, i.e. as in an applicant having committed certain crimes, it seems unlikely it would do away with annual quota-based limits even if all potential applicants were ideal.

[93] Again, this article borrows the concept of autonomy from Raz. *See* RAZ, *supra* note 12; *see also id.*, at 390-95. There are many ways to determine an optimal population range for a given polity.

However, before the argument is assessed, it will help to lay out a conceptual framework regarding autonomy as a value, and its relation to the legitimacy of law—primarily as it has been developed in Joseph Raz's theory of perfectionism. The point of this is to establish autonomy as a legitimate value that the state can pursue, before then basing the value of antecedent law on autonomy.

Raz has famously rejected the notion that a state need be neutral among visions of the good life, arguing instead that it should promote objectively valuable autonomy, ensuring citizens valuable options in life and taking steps to eliminate worthless ones:[96] autonomy "permits and even requires governments to create morally valuable opportunities, and to eliminate repugnant ones."[97] Raz defends a version of John Stuart Mill's harm principle (crudely stated, the state may use coercion only to prevent harm to others) that is seemingly premised on maximizing a morally valuable and objectively defensible version of autonomy. A full examination of Raz's argument is not necessary here, but suffice it to say that he goes very far towards establishing a liberal legitimization of extensive state action to promote autonomy.[98]

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[94] *See, e.g.*, Alan Carter, *Moral Theory and Global Population*, 99 PROC. ARISTOTELIAN SOC'Y 289, 289 (1999) ("[T]he question of what the optimum human population should be is a pressing one."). Carter proposes a principle based on a plurality of moral values which combines utilitarianism, Kantianism, Aristotelianism, and Rawlsianism, *id.* at 307, the upshot of which requires a significant reduction from the current world population. *Id.* at 312-13.

[95] Rousseau suggested that two conditions necessary for democracy are a small state and public virtue. ROUSSEAU, *supra* note 5, at 56.

[96] *See* RAZ, *supra* note 12, at 401-24 (1986).

[97] *Id.* at 417.

[98] For a thorough discussion and critique of Raz's theory see Jeremy Waldron, *Autonomy and Perfectionism in Raz's Morality of Freedom*, 62 S. Cal. L. Rev. 1097 (1989);

Although Raz claims that coercion can only be employed to prevent harm to oneself or others, scholars have questioned whether the logical conclusion of his work is in fact that coercion can justifiably be used to ensure autonomy.[99] For example, John Stanton-Ife has proposed that "'[a] moral theory which values autonomy highly can justify restricting the autonomy of one person for the sake of the greater autonomy of others or even of that person himself in the future.'"[100] Stanton-Ife uses the example of gambling: if the state permits people to gamble rather than seeking to eliminate the behavior, it may seem as though the state is promoting autonomy by allowing people to do what they wish. But to the extent the presence of gambling makes people less autonomous, less free to pursue morally valuable activities, this may not be the case. "Could it not be that the availability of some repugnant options *does* detract from the autonomy of some people? The image of the tree surgeon comes to mind. Some branches are lopped off by the tree surgeon for the health of the tree."[101] Professor Waldron finds that in Raz's theory "to say that coercion may be used only to prevent harm is to say that the autonomy of one person may be threatened only where it is necessary to avoid some unacceptable diminution of the autonomy of another. And Raz subscribes to this view."[102]

The point of bringing in Raz's work is not to suggest that antecedent law should employ coercive methods in pursuit of autonomy (though, of course, antecedent law will often address behavior that causes harm).[103] In fact, coercion may not be the best means of ensuring compliance with antecedent laws,[104] assuming we can even distinguish coercion from non-coercion.[105] Rather, Raz's work is illuminating for its assertion that a state that values autonomy will have a compelling interest in promoting it, justifying even coercive laws as morally legitimate exer-

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see also John Stanton-Ife, *The Limits of Law*, § 4, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 2.

[99] *See* Stanton-Ife, *supra* note 98, § 4; Waldron, *supra* note 98, at 1140-41.

[100] Stanton-Ife *supra* note 98, § 4 (quoting RAZ, *supra* note 12, at 418).

[101] *Id.*

[102] Waldron, *supra* note 98, at 1140.

[103] *See supra* note 16 and accompanying text.

[104] *See supra* note 79 and accompanying text.

[105] *See* Waldron, *supra* note 99, at 1141-52.

cises of political power. And, it follows that, if we accept Raz's argument, and if a specific body of normative antecedent law can effectively promote autonomy, then the polity will have a similar interest in it.

If successful, the claim that antecedent law can promote autonomy would help to defend the legitimacy and desirability of policies ranging from the type of no-procreation orders mentioned above,[106] to restrictive immigration, parental liability, and compulsory education laws. It would lead us to reject social norms that urge all citizens to procreate to maximum biological capacity (and laws that promote those norms such as public financial incentives), in favor of norms that ensure we choose to create children only in circumstances which will promote their civic quality. For example, it might standardize and enforce parental obligations to instill civic quality in their children—both as a direct and traditional law means of promoting the child's citizenship and thereby the autonomy of others in the polity, and as an indirect and antecedent law means of checking procreation by burdening the act with substantial and enforceable duties.

C. Antecedent Law as Promoting Autonomy

With this goal of promoting autonomy in mind, we can begin to assess the claim that antecedent law that seeks to promote civic quality and an optimal population range tends to promote autonomy,[107] perhaps more so than traditional forms of law. But first it might help to identify some of the abstract reasoning behind the claim, or three sub-hypotheses and two premises, revealed in the discussion below.

The first sub-hypothesis is that antecedent law can avoid autonomy-reducing incidents of both the violation of law and coerced compliance with it, as well as the costs (in terms of reducing autonomy) of having to expend resources caring for others. The most concrete demonstrations of this claim are those cases in which courts have issued no-procreation orders, rather than no-custody orders, to neglectful and abusive parents who are adjudged unfit.[108] No-custody orders usually mean that any future child is born into state custody, and as such, he or she will be more likely to commit crimes than the average child.[109] No-procreation orders temporarily enjoin the prospective parent from having children (usually until they are fit), and therefore avoid a situation in which others must care for the child or be threatened by him, and in which he or she themselves are more likely to lose autonomy as a result of violating the law.

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[106] *See* Dillard, *supra* note 39.

[107] It is uncertain whether the promotion of autonomy, as a reason for official action, would be prohibited by the type of rights theory proposed by Ronald Dworkin, and explained succinctly by Jeremy Waldron in Jeremy Waldron, *Pildes on Dworkin's Theory of Rights*, 29 J. LEGAL STUD. 301 (2000), but to the extent it is distinguishable from things like racial or religious prejudices, it should not be.

The second sub-hypothesis is that antecedent laws (no-growth ordinances, for example)[110] can reduce specific losses of autonomy that inevitably arise when there are new entrants to the polity.[111] For example, introducing others into a polity dilutes the value of one's vote, which reduces one's say in political matters, in turn reducing the degree of control one has over one's life.[112] Vote dilution may mean something very different in a legal system, as opposed to a political or economic system (discussed above), but this is beyond the scope of this article.

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[108] *See generally* Dillard, *supra* note 39.

[109] *See supra* note 40 and accompanying text.

[110] *See* Pierce, *supra* note 17, at 143:

> Sustainable no-growth regulations, along with other necessary population stabilization measures, can turn the elastic relationship between population and law upside down. Sustainable no-growth controls, along with other affirmative population measures have the potential to reverse the currently expanding population. If they do reverse the trend, the need for more powerful regulations will subside. This contraction of regulation will allow individual rights to expand once again—a notion that every American can appreciate.

See also Dennis J. Herman, *Sometimes There's Nothing Left to Give: The Justification for Denying Water Service to New Consumers to Control Growth*, 44 STAN. L. REV. 429 (1992).

[111] "[T]wo thousand years of democratic theory either explicitly or implicitly presupposed that democracy could only work on a very local level." Nick Robinson, *Citizens Not Subjects: U.S. Foreign Relations Law and the Decentralization of Foreign Policy*, 40 AKRON L. REV. 647, 676 (2007) (citing ROBERT A. DAHL & EDWARD R. TUFTE, SIZE AND DEMOCRACY 55 (1973). Hart argued that simple systems of unofficial rules could only obtain in small communities. *See* HART, *supra* note 1, at 92. For a discussion of how an increasing population threatens various rights and liberties, see Carter J. Dillard, *Rethinking the Procreative Right*, 10 YALE HUM. RTS. & DEV. L.J. 1, 56-59 (2007). A loss of autonomy here is indicated by a loss of say in public decisions that can constrain one's choices. That is not to say that population increases in a given polity cannot increase certain choices, even valuable choices, that one is given through the opportunities others create. *See, e.g.*, Claude S. Fischer, *The Subcultural Theory of Urbanism: A Twentieth-Year Assessment*, 101 AM. J. SOCIOLOGY 543, 568 (1995) ("Urbanism probably promotes the emergence of numerous and diverse subcultures within a community."); Thomas C. Wilson, *Community Population Size and Social Heterogeneity: An Empirical Test*, 91 AM. J. SOCIOLOGY 1154 (1986) (determining that an increase in community size can

The third sub-hypothesis is that persons' ability to coordinate their actions among one another and thereby gain autonomy from successful coordination of activities is related to the number of people attempting to coordinate their actions and their respective levels of civic quality. Consider John Finnis and Joseph Raz's discussion of people coordinating their behavior to use, but not pollute, a river.[113] Do their chances of reaching

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increase social heterogeneity, specifically political and sexual attitudes). That said, these additional choices may not reflect additional autonomy in the sense of maintaining one's say against vote dilution, or otherwise. *See* HENRY DAVID THOREAU, *Walking*, *in* THE PORTABLE THOREAU 592, 592 (1964) ("I wish to speak a word for Nature, for absolute Freedom and Wildness, as contrasted with a freedom and Culture merely civil."). And to the extent urbanization increases crime, it reduces the autonomy laws were made to promote.

[112] *See* Rousseau, *supra* note 5, at 50-51:

> Suppose the State is composed of ten thousand citizens. The Sovereign can only be considered collectively and as a body; but each member, as being a subject, is regarded as an individual: thus the Sovereign is to the subject as ten thousand to one, i.e., each member of the State has as his share only a ten-thousandth part of the sovereign authority, although he is wholly under its control. If the people numbers a hundred thousand, the condition of the subject undergoes no change, and each equally is under the whole authority of the laws, while his vote, being reduced to one hundred-thousandth part, has ten times less influence in drawing them up. The subject therefore remaining always a unit, the relation between him and the Sovereign increases with the number of the citizens. From *this it follows that, the larger the State, the less the liberty.*
>
> . . . .
>
> Now the less relationship there is between private wills and the general will, that is, between mores and the laws, the more repressive force ought to increase. Therefore, in order to be good, the government must be relatively stronger in proportion as the populace is more numerous.

(emphasis added); *see also id.* at 55 ("[D]emocratic government is suited to small states . . . .").

[113] *See* Leora Batnitzky, A *Seamless Web? John Finnis and Joseph Raz on Practical Reason and the Obligation to Obey the Law*, 15 OXFORD J. OF LEGAL STUD. 153, 155 (1995) ("[T]he law is instrumental in setting up and maintaining schemes to motivate those who would not otherwise contribute their shares (first legal technique) but also through designating in an open and public way what the scheme is and what each has to do as his contribution to it (second legal technique), thus enabling those who are motivated by the appropriate reasons to take part in the co-operative enterprise.").

agreement fall as more persons compete for access to the river?[114] What if, moreover, each additional person is unreasonable (the antithesis of Raz's angel)[115] and unlikely to cooperate?

Along with theses sub-hypotheses it will help to keep two specific premises in mind, both of which may be counterintuitive. The first is that antecedent law can promote autonomy even for the subjects whose behavior it seeks to control through a form of morally defensible paternalism. This is so because it also promotes those subjects' civic quality and, in Raz's terms, eliminates morally repugnant opportunities. For example, a prospective parent subject to a no-procreation order, a teen who would become a parent but for laws discouraging teen pregnancy, or a minor subject to compulsory education arguably gains autonomy in this process.[116] The second premise is that autonomy is measured only with regard to members of a polity. That is, to the extent antecedent law reduces the autonomy of (or opportunities for autonomy for) those outside of the polity, the reduction is not considered, though one could consider law that enhances the autonomy of those entering the polity (a child or immigrant entering in autonomy ensuring circumstances).[117]

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[114] *See* HUME, *supra* note 66, at 97 (referring to the evident benefit of rules to deal with the selfishness and confined generosity of men, Hume notes: "But when society has become numerous, and has encreas'd to a tribe or nation, this interest is more remote; nor do men so readily perceive, that disorder and confusion follow upon every beach of these rules, as in a more narrow and contracted society."); ROUSSEAU, *supra* note 5, at 43 (he refers to the limits of polities "so as not to be too large to be capable of being well governed, nor too small to be capable of preserving itself on its own. . . . [t]he more the social bond extends the looser it becomes, and in general a small state is proportionately stronger than a large one. A thousand reasons prove this maxim.").

[115] *See* RAZ, *supra* note 4, at 159 (discussing angels' "universal and deep-rooted respect towards their legal institutions," which allows for a sanctionless legal system).

[116] Less extreme cases of how autonomy might be promoted by antecedent law are usually too common to notice. In 2008, residents of New Orleans evacuated the city as hurricane Gustav approached, but the evacuation was curtailed despite the dangers of returning because residents could not afford to stay out.

> 'It was just expensive, the whole hotel deal,' said Trevor Chase, a waiter at the Creole restaurant Dooky Chase, as he stood next to his car on Painters Street in the Gentilly section. 'We'd rather be without power.' Chase had been in Baton Rouge, Louisiana, for four days with his three children. 'We can't afford to be out like that,' he said, adding that the financial strain had 'caused a little stress on the family.'

Adam Nossiter, *Mayor Allows Residents to Return to New Orleans*, N.Y. TIMES, Sept. 4, 2008, *available at* http:www.nytimes.com/2008/09/04/world/Americas/04ihtorleans.1.12892608.html.

With all of this in mind, we can return to our heuristic concepts above, using a fictitious polity to intuitively test the claim. Let us assume that persons have already left the state of nature, threatened by increasing competition for resources and a growing lack of compliance with natural law (e.g., persons murdering one another) and have come together to form Fredonia. Its citizens seek to promote autonomy, which they value highly and take as a compelling state interest, and they are fully able to enact both antecedent and more traditional forms of law to pursue that interest. They might seek to promote autonomy by constitutionalizing norms that, for example, prohibit and punish any act of violence within Fredonia, and laws that preserve vast tracks of wilderness. In passing these laws, the Fredonians will focus on constraining the behavior of all persons present in Fredonia. They will not focus on who or how many actually become present, and they will assume that all such persons are by nature—irrespective of the actual circumstances in which they are born—equally susceptible to the laws. The Fredonians are focused on the terms of the social contract, so to speak, and not on its parties.

They may think that the laws have, themselves, solved the problems of violence and threats to wilderness caused by the competition for scarce resources, even though nothing in the laws has altered the civic quality (disposition towards violence) of the citizenry or the ratio of citizens to natural resources. Much as we assume that the law, exclusively, guides judges' behavior, the Fredonians assume that, once proclaimed, the laws will determine citizens' behavior. They do not consider people's dispositions to actually follow the laws, or the increasing pressure created as the number of resource claimants slowly grows. Like most polities, the Fredonians are neither particularly fixated on the dissolution of their society, nor on the role of their fellow citizens' civic qualities and number in that event. They have a static and gestalt view of the "Fredonian people" as a unitary mass, rather than an atomistic view of each Fredonian (as well as prospective Fredonians) and his or her civic quality.

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[117] *See Regulating Eugenics*, *supra* note 7, at 1582 (referring to genetic interventions "reasonably calculated to add to the possible set of life choices that the child will have or augment the child's ability to pursue her preferred life path."). The content proposed here seeks to promote a similar autonomy, albeit without genetic intervention and one more objectively valuable in Raz's terms. For a thorough discussion of promoting the autonomy of prospective children, see Dena S. Davis, *Genetic Dilemmas and the Child's Right to an Open Future*, 28 RUTGERS L.J. 549, 592 (1997) ("The concept of the child's right to an open future offers a new way to resolve these issues by focusing on the autonomy of the child (present or future) as a limit on the autonomy of the parents.").

But, because of this limited approach and the resultant gaps in the law, there are people in Fredonia who lack even a minimum civic quality, are not susceptible to the laws, and, therefore, act violently toward others and destroy the wilderness that was set aside. The problems worsen as more persons of low civic quality become present—the law taking no particular view of their arrival. The Fredonians respond by punishing violators with increasing severity in an effort to counteract the trend—moving away from the sanctionless system imagined by Raz. But, in doing so, they reduce the autonomy of those punished and, in acting after the fact, they have failed to protect the autonomy of the victims of the crimes. Moreover, the need to punish violators, and care for and perhaps compensate the victims imposes an opportunity cost that further reduces Fredonians' autonomy. Additionally, because they are unsure whether others will respect the wilderness, law-abiding Fredonians will now compete for access, thereby undermining autonomy that was gained by passing the law in the first place. Fredonia may even choose to provisionally reduce the autonomy of all of its citizens—imposing curfews and travel restrictions, or derogating from privacy rights—to deal with the threat.

There is a similar loss of autonomy as the number of Fredonians increases, as each Fredonian's claim to the original physical subject of the contract (Fredonia) is divided, and as each one's vote, or say in matters that affect them, is diluted. Attempts to coordinate solutions to these problems are, in turn, made more difficult now that more people participate in and each person has a lesser say over the solution. Further, chaos becomes ever more probable with the constant influx of unreasonable people (the Fredonians having taken no steps to assure the civic quality of new entrants) who are unwilling to cooperate.[118]

Admittedly, even if the Fredonians, at the genesis of their social contract, had focused on circumstances which ensure the civic quality of each new member, and focused on the ratio of members to scarce resources (or optimal number of parties to the contract), there would have been costs in terms of autonomy. Legal systems that regulate procreation, immigration, and education require the same sorts of state expenditures that systems primarily relying on *ex post* criminal sanctions do. But assuming the antecedent laws were effective, and were not so coercive as to themselves reduce autonomy,[119] there would be a net gain in autonomy when using antecedent law. And this remains true even if we discount any gain in autonomy experienced by those subjected to the laws (e.g., a minor subject to compulsory education, a teen prevented from becoming a parent, or those benefiting from a general reduction of cultural pronatalism).[120] The autonomy cost of implementing antecedent laws is only a fraction of those incurred due to the initial failure to assure civic quality and an optimal population range.

III. THREE COUNTERARGUMENTS

Finally, it is important to consider and assess the likely counterarguments. First, as a descriptive matter, one might argue that states (perhaps the United States) can and do exist without antecedent law, that is, that antecedent law cannot be distinguished from traditional law. The second is a normative argument. It acknowledges that the form exists but argues that the state should minimize any influence it has through law on the creation and quality of persons within it. The third argument also admits that the form exists but argues that the state should fashion a particular content, or substantive antecedent law that is antithetical to the content proposed in Part II.

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[118] For an interesting discussion of the costs of enforcement in the context of international institutions, see STEINER ET AL., *supra* note 81, at 716 ("The more severe the enforcement problem, the more restricted the membership. When actors face an enforcement problem (that is, when individuals do not have an incentive to voluntarily contribute to group goals), collective action is problematic. Moreover, the severity of the enforcement problem increases with the number of actors . . . ." (quoting Barbra Koremenos et al., *The Rational Design of International Institutions* 55 INT'L. ORG. 761, 783 (2001))).

[119] For example, a polity might choose withdrawal of official charters for businesses that violate immigration laws rather than increased removal of persons, or vicarious parental liability laws rather than population quotas. However, for a discussion of the difficulty of eliminating coercion even in structural changes to the law, see Waldron, *supra* note 98, at 1141-52.

[120] This article will not discuss the full argument, but there is possibly a gain in autonomy as persons migrate from a primarily personal or agent-relative morality focused on one's biological counterparts, to one more inclusive of impersonal or agent-neutral (utilitarian, for example) morality. For a discussion of personal and impersonal morality, see NAGLE, *supra* note 30, at 164-88.

A. Antecedent Law Need Not Exist

As to the first counterargument, when a state grants child tax credits, regulates marriage, regulates contraception and abortion, regulates immigration, or standardizes aspects of education, it influences the number and quality of persons within it.[121] It would be a mistake to think that only states with explicit family planning policies, like the PRC, regulate their demography, while states, like the United States , with more subtle policies do not; it would also be a mistake to think that states like the PRC must rely on constant coercion to do so.[122] Moreover, even if a state uses its authority to protect broad procreation or immigration rights against legislation that might limit them, it is still actively influencing the size and composition of its constituency. For example, when a court overturns a local no-growth ordinance, it enables the influx of new members the citizens sought to prevent; it imposes its own outcome over the more democratic one, the one chosen by the citizens.

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[121] For a description of various population policies in the United States, see Mona L. Hymel, *The Population Crisis: The Stork, the Plow, and the IRS,* 77 N.C. L. REV. 13, 15-18 (1998) (discussing pronatal United States tax law); Paula Abrams, *The Tradition of Reproduction*, 37 ARIZ. L. REV. 453, 490-92 (1995) (discussing the history of pronatalism in United States law); LARRY D. BARNETT, POPULATION POLICY AND THE U.S. CONSTITUTION, ch. 3 (1982) (providing an extended discussion of United States law and demography).

[122] *See, e.g.*, Yilin Nie & Robert J. Wyman, *The One-Child Policy in Shanghai: Acceptance and Internalization*, 31 POPULATION DEV. REV. 313, 313-36 (2005) ("The one-child family is considered normal; few are still concerned with the policy per se, while others see it as unnecessary. The one-child policy seems to reflect Shanghainese current preferences; its status as a legal requirement may be largely irrelevant."); Baochang, *supra* note 80, at 145 (finding that "government-mandated fertility and achieved fertility have converged in China").

Similarly, when a state tries to take its hand off the reins and have no antecedent law at all, it may merely reinforce, by tacit agreement, the behavioral norms which exist and past laws helped shape.[123] If a state once promoted prontalism to build its armies or its workforce, the decision to switch to a rhetoric, unaccompanied by regulation, of reproductive rights does not reverse the trend; it simply shifts state policy into neutral and allows the state to coast forward on its existing path.[124] The sea of dicta emphasizing reproductive freedom in the United States[125] is of little help when in terms of cultural norms "a couple must normally choose *not* to have a child."[126] This is the extant pronatal cultural preference that is fostered by law.

The United States has one of the highest fertility rates in the industrialized world. It also has a one thousand dollar per child tax credit and other pronatal institutions,[127] as well as a Supreme Court that has treated, in pervasive dicta (often repeated by commentators), *both* procreation and contraception as coextensive fundamental privacy rights.[128] The United States aside, those polities representing the largest populations in the world have all, at one time or another, explicitly regulated procreation.[129] It seems unlikely that states do, or even can, avoid influencing the presence and civic quality of their constituents.

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[123] "Reproductive regulation cannot be separated from the vision of woman as mother, which is its genesis . . . ." Abrams, *supra* note 121, at 456. Abrams refers to "the pronatalist message of religion, philosophy, and politics and its manifestation into law" and finds that, even in the modern reproductive rights precedent, pronatalist norms are reinforced. *Id.* at 456, 483-91; *see also* M.A. Ryan, *The Argument for Unlimited Procreative Liberty: A Feminist Critique*, 20 HASTINGS CTR. REP. 6, 6 (1990) ("From a feminist perspective, unlimited procreative liberty risks treating children as property, distorts understanding of the family, and neglects moral concerns about how we reproduce."). By not refuting pronatalism, even seemingly neutral legal doctrines fail to rebut this status quo. *Cf.* STEINER, *supra* note 81, at 176 ("Legal norms capture and reinforce deep cultural norms and community practices. They entrench ideas and help give them the sense of being natural, part of the inevitable order of things."); Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1605 (2000) ("Of course, no one believes that the only way that the state ever influences the behavior of its citizens is through the incentive effects of legal rules. Quite clearly, the state sometimes influences behavior by shaping preferences rather than by constraining opportunities."); ROUSSEAU, *supra* note 5, at 95 ("Among all the peoples of the world, it is not nature but opinion which decides the choice of their pleasures. . . . Although the law does not regulate mores, legislation is what gives rise to them.").

[124] Purdy argues that promoting a broad version of reproductive autonomy in certain circumstances will have pronatal consequences, increasing fertility rates. *See generally* Purdy, *supra* note 9, at 940-54.

[125] *See*, Dillard, *supra* note 111, at 15-20. In a display of the pronatalism Abrams identifies, that particular dicta—mostly arising in cases dealing with the right *not* to procreate—has been read as a constitutional rule protecting an absolute right *to* procreate. *See, e.g.*, State v. Oakley, 629 N.W.2d 200, 219 (Wis. 2001) (Bradley, J., dissenting) ("Men and women in America are free to have children, as many as they desire. They may do so without the means to support the children and may later suffer legal consequences as a result of the inability to provide support.").

[126] Note, *Legal Analysis and Population Control: The Problem of Coercion*, 84 HARV. L. REV. 1856, 1870 (1971) (emphasis added).

B. Antecedent Law Should Not Exist

The second counterargument holds that a state should minimize antecedent law because it interferes with privacy rights and/or autonomy and is therefore inherently illiberal.[130] Advocates of this view claim that having a child is a private or autonomous act. But that certainly might come as a surprise to the person born, and, unless parents plan to keep their child in a cage, the persons with whom the child will interact—and whose lives she will inevitably affect.[131] If not the state, then who should be responsible for the presence and civic quality of the polity? Does it really make sense to ignore these issues entirely? Is not the history of procreative freedom also the history of bad parenting and its consequences?

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[127] Leonard E. Burman & Laura Wheaton, *Who Gets the Child Tax Credit?* TAX NOTES at 387-93 (Oct. 17, 2005) (citing the Joint Committee on Taxation, *Estimates of Federal Tax Expenditures for Fiscal Years 2005-2009* (Joint Committee Print JCS-1-05.Washington, DC: US Government Printing Office)). For example, a recent draft Health and Human Services Department regulation defines certain forms of contraception as abortion making access to them more difficult. *See* Bob Egelko, *Bush Plan Would Blunt State Birth Control Law*, S.F. CHRON., Aug. 21, 2008, at A1.

[128] *See* Dillard, *supra* note 111, at 15-20.

[129] *See id.* 35-37.

[130] *See generally* Eichner, *supra* note 23; Amartya Sen, *Fertility and Coercion*, 63 U. CHI. L. REV. 1035, 1039- 41 (1996). Sen is an eloquent proponent of a broad procreative right and defender of the inviolability of the familial realm. For a rebuttal to Sen's characterization of the right and inviolability of the realm, see generally, Dillard, *supra* note 111. Furthermore, Sen has argued that any encroachment on the realm can result in a net loss of autonomy. Sen states:

> A case for state intervention in fertility decisions is sometimes derived from a diagnosis of "externalities": a family's decision to have one more child could affect the interests--or for that matter the sense of propriety--of other people. This diagnosis can be used to advocate many different policies, from changed price incentives through taxes and governmental subsidies to legal and other restrictions on the family's reproductive decisions. This easy "translation" of interventionist arguments, from standard cost-benefit analysis to family planning, needs close scrutiny. As discussed above, we cannot but see family planning as a rather private subject in which—to use Mill's phrase—there is "no parity" between the family's own direct involvement and those of others. . . . This is not an argument to ignore all else, but that "all else" has to be very powerfully contrary to outweigh the general presumption in favor of leaving reproductive behavior to the family in general and to the woman in particular.

Sen, *supra*, at 1049-50 n.41.

When we aggregate all acts of procreation in a given period of time, the impact of those acts can be seen even more clearly as "public."[132] Considering that even a single act will project its effects through all future descendants, procreation may be the *most public* act in the average citizen's life.

Moreover, there is nothing in the *form* of antecedent law that is itself illiberal, nor is it illiberal for the state to seek to maximize autonomy. Similarly, the particular substance or content of antecedent law enacted to achieve that end would not be illiberal, as long as its means were not so coercive as to be counterproductive (autonomy reducing) or to violate legitimate rights. As shown in Part II, antecedent law as a form can promote autonomy *more* than traditional forms of law. This is a view with which some proponents of a broad procreative right, like Amartya Sen, might agree, even though they would choose a different means.[133]

A variant to the second argument treats antecedent law as a form of social engineering that is undemocratic. "It is axiomatic to liberal democracy that the governed should choose the government, not vice versa. . . . Any attempt to directly influence the composition of future generations amounts to the state's choosing the governed, and that is not acceptable in a liberal democracy."[134] Under this argument the state should play little if any role, and the parents should have plenary authority—even to the point of engaging in genetic enhancement of their children.[135] The argument may be premised on the assumption (very much like the first counterargument) that, because at some point in history people formed the state and its first laws, the role of who makes whom can never be reversed. But that aside, there are at least three responses.

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[131] For a discussion of the interpersonal aspects, or negative externalities, of procreating, see Dan Brock, *Shaping Future Children: Parental Rights and Societal Interests*, 13 J. POL. PHIL. 377 (2005). John Stuart Mill, referring to the moralities of justice that prevent harming others or hindering their pursuit of the good, said that "[i]t is by a person's observance of these that his fitness to exist as one of the fellowship of human beings is tested and decided; for on that depends his being a nuisance or not to those with whom he is in contact." MILL, *supra* note 40, at 60. Rousseau refers to the civil religion as "sentiments of sociability, without which it is impossible to be a good citizen or a faithful subject." ROUSSEAU, *supra* note 5, at 102.

[132] *See* Brock, *supra* note 1310, at 378 ("It is widely recognized, both in history and in political theory, that the effect of many individual decisions, themselves each rational and justified as individual choices, may be collectively undesirable for a group or society.").

[133] *See* Sen, *supra* note 125, at 1061 (arguing in part that promoting education can reduce fertility, enhance freedom, and be "the 'solution' to the population problem").

A democratic regime is an artificial entity made to represent each citizens' individual interests.[136] The governed choose the government, which then affects the governed. Do the governed have an interest in who one another other is, in whom they share the polity? Does one care about whom one is in social contract with, or just about the terms of that contract? Why should one not have a say in something that affects one so deeply as the determinants of the polity around one, and thereby the laws one will be subject to? In a democratic polity, each citizen relies on all other citizens to determine the government and the economy, in short, the state of affairs, including antecedent law. If antecedent law is created through a democratic process there is nothing undemocratic about it; to leave it wholly to the realm of the family, in the name of preserving privacy rights, would be far more undemocratic.

Moreover, leaving it to the private realm of family life does not necessarily protect liberal values. The citizens are generally not constrained by constitutional limits, such as a prohibition on practicing or teaching discrimination, whereas the state is. Avoiding antecedent law also prevents the state from actually promoting liberal values. An antecedent approach to civil rights law acknowledges that some in the polity recognized and respected civil rights before formal civil rights laws were ever promulgated, and avoids presuming that secondary-type laws that constrain racist behavior suffice. Treating racism as an absence of civic quality, antecedent law could promote autonomy by preventing the creation of racists—intensively targeting specific communities where education—whether at home or in school—was lacking or contrary to civil rights norms.

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[134] *Regulating Eugenics*, *supra* note 7, at 1596-97.

[135] *See generally id.* (arguing that liberal eugenics, in which parents modify genetic makeup of their children so as to enhance their life choices, is best understood as a fundamental right).

[136] *See* Joseph Raz, *Rights and Politics*, 71 IND. L. J. 27, 35 (1995) ("The public interest is, and is generally taken to be, a function of individual interests."); HOBBES, *supra* note 32, at 138 (explaining that persons "have made an artificial man, which we call a commonwealth").

The second response is that, as all will admit and as one opponent to antecedent law stated, "although we accept a certain amount of molding as necessary for society to function, we accept only that amount that is necessary."[137] In other words, *both* the state and parents inevitably make choices that help determine the presence and civic quality of persons in the polity—whether they want to or not. And once the door is open, determining what it means for "society to function" and what is "necessary" is not an easy matter. Yet, it is better to task the state with this responsibility than to leave it to parents who are unelected, unrestrained by constitutional prohibitions, not obligated to be transparent and accountable in their dealings, and not necessarily mentally fit.

Third, the fear of social engineering, as described by opponents of antecedent law,[138] seems to be partially based on the threat it poses to pluralism, i.e., the states ability to impose a comprehensive concept of the good.[139] However, civic quality, as defined above, on all points of its spectrum, is not a comprehensive concept of the good or a moral doctrine. It is more akin to the "public civility" that Rawls advocates to ensure a minimum environment where pluralism can flourish.[140] We can return to the example of academia. University law (itself analogous to antecedent law) is first about exclusion of those incapable of composing themselves in a manner conducive to the beginnings of a well ordered society that ensures pluralism.

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[137] *Regulating Eugenics*, *supra* note 7, at 1598 (referring to compulsory education).

[138] *See generally Regulating Eugenics*, *supra* note 7.

[139] *See id.* at 1596 ("The real trouble with eugenics is not that it can be coercive; it is that the state can use it to create the citizens it wants to govern.").

[140] RAWLS, *supra* note 24, at 92.

C. Promoting Values Other Than Autonomy

The third, final, and most insidious counter-argument admits that antecedent law exists, but argues for contents antithetical to those suggested in Part II. It is here that proponents of eugenics have historically made their claims, and in reaction to them we might have thrown away the entire form of antecedent law just to be safe.[141] That would have been a mistake. Eugenics involves, by necessity, genetics.[142] Antecedent law, as a form, has no necessary relation to genetics or biology. Here the form and content distinction is vital.

The form focuses on how law determines presence and thus civic quality. This form can be used to explicitly reject any underlying value, or state interest, in genetic attributes per se, including the value of adding more or fewer persons of a particular race or genetic makeup.[143] Again, we can do so because it seems likely that genetics or biology have nothing to do with civic quality, and that the relevant attributes can be instilled in anyone through upbringing and education. And if we are going to reject eugenics we may choose to do so fully, regardless of whether it is pursued by the polity or by its members.[144] In doing so, we could reject the very act of determining who should be present in the polity or attempting to influence our collective civic quality with reference to genetics.[145]

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[141] Commentators certainly seem wary of any law that explicitly controls the presence and quality of persons in a given polity. *See, e.g.*, *Regulating Eugenics*, *supra* note 7; *see also* Matthew J. Lindsay, *Reproducing a Fit Citizenry: Dependency, Eugenics, and the Law of Marriage in the United States*, 1860-1920, 23 LAW & SOC. INQUIRY 541 (1998); Matthew J. Lindsay, *Preserving the Exceptional Republic: Political Economy, Race, and the Federalization of American Immigration Law*, 17 YALE J.L. & HUMAN. 181 (2005). Admittedly the PRC's family planning regime—a key example of antecedent law—has involved segregable instances of eugenics, *see* GREENHALGH *supra* note 46, at 217, though as noted in Part III, this is something that antecedent law as a form can explicitly and effectively reject.

[142] *See Regulating Eugenics*, *supra* note 7, at 1579.

[143] This would include the type of pronatal quasi-eugenics hinted at by some proponents of increased fertility rates. *See, e.g.*, Russel Shorto, *No babies?*, N.Y. TIMES MAGAZINE, June 29, 2008, at 2, *available at* http://www.nytimes.com/2008/06/29/magazine/29Birth-t.html?ref=world ("The fears on the right are of a continent-wide takeover by third-world hordes — mostly Muslim — who have yet to be infected by the modern malady called family planning and who threaten to transform, if not completely delete, the storied, cherished cultures of Western Europe.").

[144] *See, e.g.*, *Regulating Eugenics*, *supra* note 7. Note though, that the liberal eugenics defended in that work, *id.* at 1582, namely those which seek to enhance autonomy, are very different from the sort of pronatal quasi-eugenics proposed to stave off the "third world hordes" referred to above.

Another type of antecedent law that might be rejected is one that values the mere production of human life per se and pursues it as an end in and of itself.[146] In this case, if we agreed that the mere production of more human lives was not valuable, we would reject laws premised on that value.[147] Antecedent law allows us to reject these things, this content, without rejecting the form itself, and losing its ability to promote other values.

These types of substantive antecedent law, at least in the foreseeable future, do not pose the greatest threat to the type of autonomy states like Fredonia value. Rather, the greatest threat may be posed by another substantive antecedent law, perhaps dominant today, a type of pronatal nationalism.[148] This pronatal nationalism values primarily the military and economic strength of a nation, as well as its "growth" (and growth in literal terms, as opposed to human betterment)[149] as ends in and of themselves.[150] It seeks to produce economic and political persons rather than legal persons, either ignoring or presuming their susceptibility to law, their civic quality.

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[145] Of course, there are pressing questions regarding how a state like the United States could regulate the conduct of prospective parents in this regard absent state action. They will not be discussed here.

[146] Some commentators take this view, though they often proceed from religious conviction. "The right to procreate goes back to the very beginning of time, and is part of our very nature. 'Be fruitful and multiply,' it should be recalled, was the first commandment given to our first parents." Steven W. Mosher, People *of Faith Beware: The Left has Decided that There is no Right to Have More Than One Child*, CATHOLIC EXCHANGE, July 31, 2008, http://www.catholicexchange.com/2008/07/31/113314/. Mosher also argues from an economic perspective. *See infra* note 153 and accompanying text.

[147] Ronald Dworkin has argued that valuing life in this way is essentially religious and, therefore, outside of the state's interest. RONALD DWORKIN, LIFE'S DOMINION 155-68 (1993); *see also* Francis Kamm, *Abortion and the Value of Life: A Discussion of* Life's Dominion, 95 COLUM. L. REV. 160, 164 (reviewing RONALD DWORKIN, LIFE'S DOMINION 155 (1993)) (Kamm refers to Dworkin's argument that "[s]ome intrinsic value is incremental value; that is, the more there is of what is valuable, the better. The sacred is nonincremental value: that something sacred is valuable is not reason to produce more of it, but is reason to treat what exists of it properly.").

[148] Note that there is a thin distinction between pronatal eugenics and pronatal nationalism, which may overlap depending on the pronatalist's view of what sort of humans need to be produced. Again, defining the fundamental procreative right as self-replacement would allows states to prevent would-be pronatal nationalists from breeding in pursuit of national supremacy.

[149] As an alternative, one can view human betterment as only beginning with security, but proceeding towards higher levels of human development. *See, e.g.*, ABRAHAM HAROLD MASLOW, MOTIVATION AND PERSONALITY 80-106 (1954) (setting forth Maslow's theory of a hierarchy of human needs in which security is merely something on which to build).

Referring to state interests in regulating abortion, Justice Stevens said that the state "may also have a broader interest in expanding the population, believing society would benefit from the services of additional productive citizens—or that the potential human lives might include the occasional Mozart or Curie. These are the kinds of concerns that comprise the State's interest in potential human life."[151] What Justice Stevens describes is antecedent law that treats prospective members of the polity as specific (and perhaps non-consenting) means to the state's or other citizens' ends, rather than as ends in and of themselves, or as people whose autonomy we seek to promote.

The following quote illustrates this kind of antecedent law:

> When fertility drops below national replacement levels, the number of productive workers likewise falls. . . . And in these terror-ridden times, it is not only the economy that nosedives with fewer workers, but national defense. . . . And while high technology may replace some of the foot-soldiers, the money for such is being diverted to pension benefits. . . . 'Does this mean that the future belongs to those who believe they are (or who are in fact) commanded by a higher power to procreate? Based on current trends, the answer appears to be yes. . . . Today, however, it has become clear that no law of nature ensures that human beings, living in free, developed societies, will create enough children to reproduce themselves.'[152]

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[150] Contrast such a view with that suggested by Rawls. Referring to the difference principle not requiring continual economic growth he finds "[w]e certainly do not want to rule out Mill's idea of a society in a just stationary state where (real) capital accumulation may cease." RAWLS, *supra* note 24, at 159.

[151] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 915 (Stevens, J., concurring in part and dissenting in part) (footnote omitted).

[152] Douglas W. Kmiec, *The Procreative Argument for Proscribing Same-Sex Marriage*, 32 HASTINGS CONST. L.Q. 653, 658 (2005) (quoting Phillip Longman, *The Global Baby Bust*, FOREIGN AFF., May/June 2004, at 64). For a discussion of a very particular form of biopolitics that seeks to use reproductive autonomy to avoid sub-replacement fertility rates, see Purdy, *supra* note 9.

This view is not novel, nor limited to procreation.[153] As one author recently opined in advocating for increased immigration, "Maintaining the United States global economic and military supremacy is inextricably interwoven with a growing population."[154] Where is the notion of civic quality in this? While World War II was under way in Europe, scholars in the United States expressed the state's economic and military interest in adding persons to the polity by suggesting that immigration could take up the slack where domestic fertility left off.[155] Today, some proponents of expanding the military advocate offering United States citizenship, regardless of one's current immigration status, in exchange for military service.[156] According to this view of antecedent law, the polity's prospective members are future soldiers, laborers, childbearers, taxpayers, and consumers,[157] not

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[153] This value, or a fear of foreign invasion, most likely led Rousseau to equivocate as to whether a polity should limit the size of its population. *See* ROUSSEAU, *supra* note 5, at 43-48, 66-67. He also may have premised the claim on a state's ability to export excess persons to colonies. *See id.* at 45.

[154] Fernando Espuelas, *Why the U.S. Needs More Immigrants*, HUFFINGTON POST, May 4, 2010, http://www.huffingtonpost.com/fernando-espuelas/why-the-us-needs-more-imm_b_562425.html.

[155] *See* A.H. Feller, Book Review, 50 YALE L.J., 949 (1941) (reviewing GUNNAR MYRDAL, POPULATION: A PROBLEM FOR DEMOCRACY (1940)).

[156] *See* Jeff Jacoby, Op-Ed., *Through the Military, A Path to Citizenship*, BOSTON GLOBE, Feb. 13, 2008, at A13. Admittedly, the autonomy of any polity's members might be contingent on successfully defending the state against foreign invasion. However, that argument is contingent on an accurate empirical assessment of the actual threat to the polity, and should not ignore means other than antecedent law for addressing (or reducing) the threat.

[157] Longman, *supra* note 152, at 69-70, 78:

> A nation's GDP is literally the sum of its labor force times average output per worker. Thus a decline in the number of workers implies a decline in an economy's growth potential.
>
> . . . .
>
> Current population trends are likely to have another major impact: they will make military actions increasingly difficult for most nations. . . . Given their few sons, it is hardly surprising that Russian mothers for the first time in the nation's history organized an antiwar movement, and that Soviet society decided that its casualties in Afghanistan were unacceptable.
>
> . . . .
>
> Education should be a lifetime pursuit, rather than crammed into one's prime reproductive years.

For another read on population and economic development see, HERMAN E. DALY, THE ECONOMICS OF SUSTAINABLE DEVELOPMENT 1 (1996). Daly refers to sustainable develautonomous would-be-members whose civic quality we promote. "Population growth is a multiplier of wealth . . . the more minds you have at work, generally the better off you are; human beings are the ultimate resource, the one resource you cannot do without."[158]

As Karl Polanyi described, this is a view of humans as a resource *themselves,* or "complete agreement on the desirability of a large population . . . . [And] ready agreement on the advantages of cheap labor."[159] It is a view that has led polities like the United States to a position where it may not fare well in an assessment of the civic qualities of its constituents.[160] The view is commonly expressed through pronatalism, but also through viewing the immigration law of a state primarily in relation to the state's economy.

Education too is not, from this perspective, treated as an end or value in itself, or valued for its ability to increase civic quality or autonomy. Rather, it is desirable primarily because it can increase gross domestic product. William Easterly, for one, sees little value in the increasing levels of education throughout the world over the past several decades, citing one particular study that found "no positive association between growth in education and growth of output per worker."[161] Longman's view is that "education should be a lifetime pursuit, rather than crammed into one's prime reproductive years" and is premised on a very particular view of prospective members of the polity.

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opment as resisted by "most economic and political institutions" which are founded on traditional quantitative growth and fear its replacement by something as subtle and challenging as qualitative development. *Id.* Of course, it may also be that these institutions have vested interests in avoiding replacing growth with qualitative development, such as an industrialist relaying on the availability of cheap labor and greedy consumers.

[158] *Economy's Reaction to a Growing Population* (Fox Business television broadcast Aug.14, 2008), *available at* http://www.foxbusiness.com/video/index.html?referralObject=3029763 (quoting Steven W. Mosher of the Population Research Institute); *see also* WILLIAM EASTERLY, THE ELUSIVE QUEST FOR GROWTH: ECONOMISTS' ADVENTURES AND MISADVENTURES IN THE TROPICS 94 (2001) (referring to the genius principle which, loosely stated, posits that the more babies born, the greater the likelihood that one of them will grow up to be a genius capable of solving the world's problems—like overpopulation).

[159] KARL POLANYI, THE GREAT TRANSFORMATION 109 (1944).

[160] *See supra* note 86.

[161] *See* EASTERLY, *supra* note 158, at 73-78.

In contrast, scholars who value autonomy tend to treat "children primarily as future citizens, belonging to their communities and their nation" and to view "state regulation of education, labor and maltreatment as justified by the state's interest in children's welfare and in their growth to autonomous citizenship."[162]

Moreover, education, in the pronatal nationalist and economic growth model, promises a narrow version of autonomy through personal material accumulation,[163] rather than a prerequisite to one's membership in the polity. It is part of what Polanyi called the "ascendancy of economics over politics proper."[164] Members of the polity are primarily economic producers rather than political constituents. In this view, a polity that consisted of a small population of highly educated and empathic citizens of high civic quality, but that had few riches and little military might, would be worthless. This is a view of persons as political or economic, and not necessarily legal.

Under the pronatal nationalist view, in direct opposition to the substantive antecedent law proposed here,[165] each member views new members of the social contract in terms of their potential usefulness, and assumes their behavior is guided by power (coercion) or material incentives and disincentives (indeed, this particular view of ourselves is promoted). The polity's[166] value is determined by its gross domestic product and military might rather than the civic quality and autonomy of each citizen.

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[162] Barbara Bennett Woodhouse, *Child Abuse, The Constitution, and the Legacy of* Pierce v. Society of Sisters, 78 U. DET. MERCY L. REV. 479, 482 (2001).

[163] "A purely materialistic motivation for getting an education is now the norm, not the exception." Victor E. Ferrall Jr., *Can Liberal Arts Colleges Be Saved?*, INSIDE HIGHER ED., Feb. 11, 2008, *available at* http://www.insidehighered.com/views/2008/02/11/ferrall.

[164] POLANYI, *supra* note 156, at 119.

[165] Again, the purpose of this article is only to introduce the concept of antecedent law, but readers may find that something like compulsory university-level education would not be inconsistent with the content suggested in Part II, while a state paying its citizens to procreate in order to build its military and economic strength would be. Though there is nothing prejudicially antinatal in the substantive antecedent law proposed here, the substantial resources required to ensure the autonomy of each new person, as well as the finite nature of all polities, makes it tend in that direction—at least relative to current fertility rates worldwide.

[166] Arguably, we need not worry about the civic quality and autonomy of new members of the polity, because we can simply divide off into sub-polities that have their *own* exclusionary antecedent laws ensuring minimum civic quality and optimal population ranges, such as modern gated-communities or even individual families holed up on private tracts of land. We might even argue that trying to impose civic quality and optimal

CONCLUSION

In pursuit of certain values, such as military and economic might, states may choose to fill themselves with as many persons as possible, irrespective of their civic qualities, as one of the first orders of business. But as external threats to states subside, they may reach a point where doing so is not necessary and where the costs outweigh the benefits. States may also choose to do so because they view the mere production of human life as per se valuable, because they view massive populations as deterring the effectiveness of internal factions,[167] or for any number of other reasons. But whatever the reason, we should be sharply aware of the role the law plays in this process because it is that process which shapes the basic state of legal affairs that lawyers must work within. As an express concept, the form antecedent law can ensure that when we think of law, we consider the number and capabilities of those subject to it, how they came to be, and how other persons subject to it will come to be in the future.

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population requirements through government is applying a comprehensive conception of the good, which per Rawls, is fitting only for a voluntary association or community and not the polity as a whole. *See* RAWLS, *supra* note 24, at 4, 10-11, 20-21. But it may be that individuals enter sub-polities to escape members of the broader polity who they believe lack minimum civic quality, rather than to voluntary associate, in Rawlsian terms, around some shared comprehensive conception of the good. Importantly, exclusionary antecedent law used in this way by the sub-polity, differs from that imposed by the government on the general polity, in that it exclude persons already within the polity, not potential future members. If this is the case, the sub-polities units are not the type of voluntary associations that Rawls may have had in mind, and by turning their back on the polity and seeing its constituents as merely useful workers and soldiers, the members of these associations, themselves, seem to lack the type of empathy with their fellow citizens that is characteristic of higher civic quality.

[167] Referring to the Framers' attempts to use federalism to avoid faction influence one commentator notes, "Contemporary observers confirm the fact that 'the smaller the population and geographic area, the greater the likelihood of dominance by a single political party or machine with a single set of mores and the greater the opportunity for aggregation of economic power to overshadow the political scene.'" John Denvir, *Justice Rhenquist and Constitutional Interpretation*, 34 HASTINGS L.J. 1011, 1038 (quoting J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 252 (1980)). Using antecedent law to disable factions from doing evil may also disable ordinary citizens from doing good.

Antecedent law may also help us to consciously choose the values we pursue. As a result, we might choose autonomy as a value rather than military or economic might, and we might choose to view the polity more like a university, intent on promoting the civic quality of each citizen, rather than as a dominant military force or a productive factory. Today we use the term "civil society" to refer to those members and institutions that comprise a sub-unit of the polity and who possess and act on certain civic qualities, but there is no reason why any member of a polity should ever have come to exist outside of its civil society—in a Lockean sense—in the first place. Political identity may best be found in the civic quality of each person that inhabits a state—and whether by action or omission, it is the law, as much as any other creator, that puts them there.

Rawls said that our "social world might have been different and there is hope for those at another time and place."[168] Lawyers who wish to change the world might first consider the type of antecedent or background law that makes the world—by which we really mean the crowd of people we have to share it with—susceptible to change.

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[168] RAWLS, *supra* note 24, at 38.

RIGHTS GONE WRONG: THE FAILURE OF FUNDAMENTALIST TORT THEORY

Dr. Tim Kaye[*]

I. INTRODUCTION

It is often said that the law of torts is in crisis. Indeed, it has become somewhat common to observe that it is currently going through its third crisis, at least as regards medical malpractice.[1] Whether this crisis is real or manufactured is, of course, a matter of some debate.[2] Yet within academic—and perhaps also some appellate court—circles, it certainly appears that there is significant disquiet about the current state of tort law theory.[3] The hegemony of the economic approach to tort law is coming under repeated attack[4]—especially from those who favor corrective justice—while new devotees seek to shore it up and remold it so as to enable it more effectively to withstand these challenges.[5] For perhaps the first time in thirty years, no one school of thought appears to hold sway—a point clearly illustrated not only by the deep divisions within the American Law Institute[6] over the proposed Third Restatement of Torts,[7] but also by the strangely convoluted and often apparently self-contradictory text of that rather overblown document.[8]

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[*] Professor, Stetson University College of Law, Florida. I should like to thank my Stetson colleagues for creating such a collegial and non-fundamentalist environment, and especially Bob Bickel and Ellen Podgor for their differing brands of encouragement and words of wisdom.

[1] *See, e.g.*, Mimi Marchev, *The Medical Malpractice Insurance Crisis: Opportunity for State Action*, 2002 NAT'L ACAD. FOR ST. HEALTH POL'Y 4, 4, *available at* http://www.nashp.org/sites/default/files/medical_malpractice _crisis.pdf.

[2] *Compare* Lawrence Chimerine & Ross Eisenbrey, *The Frivolous Case for Tort Law Change: Opponents of the Legal System Exaggerate its Costs, Ignore its Benefits*, 2005 ECON. POL'Y INST. 1, 6, *available at* http://epi.3cdn.net/27399496d31825244f _wgm6bx18j.pdf (rejecting the idea of tort law being in a crisis), *with* F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 524 (2006) (arguing that various societal factors contribute to the currently lamentable state of tort law).

[3] *See, e.g.*, Nicholas J. McBride, *Duties of Care--Do They Really Exist?*, 24 O.J.L.S. 417, 419 (2004); Jane Stapleton, *Controlling the Future of the Common Law by Restatement*, *in* EXPLORING TORT LAW 262, 294 (M. Stuart Madden ed., 2005).

[4] *See, e.g.*, Benjamin C. Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999 (2007); Richard W. Wright, *Hand, Posner, and the Myth of the "Hand Formula,"* 4 THEORETICAL INQUIRIES L. 145 (2003); Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 FORDHAM L. REV. 1811, 1843 (2004).

[5] *See, e.g.*, Keith N. Hylton, *Duty in Tort Law: An Economic Approach*, 75 FORDHAM L. REV. 1501, 1502 (2006).

Politicians like to argue that the battle lines in the "torts crisis" are currently drawn between two camps: on the one side, those in favor of so-called "tort reform" in the interests of American society or, more specifically, the American economy; and on the other, those in favor of the downtrodden "little guy," whose rights are all too easily infringed by powerful organizations and institutions. In reality, of course, we all know that the issues raised by the law of torts are so complex that there are actually many more points of view than are permitted by this simplistic dichotomy. Yet, for some reason, it remains fashionable among American tort law theorists to assert that all scholars must side with one of two camps.[9] Even such distinguished theorists as Ernest J. Weinrib[10] and Richard W. Wright,[11] both of whom favor corrective justice, have fallen prey to this peculiar phenomenon. The latter has asserted, for example, that:

> [A] successful normative and descriptive theory of law should at least be able coherently to explain and justify the principal features of the existing law. Only a monistic foundational theory holds out any prospect of being able to do so.
>
> The two principal monistic theories of law are (1) utilitarian efficiency theory, based on the foundational norm of maximizing aggregate social welfare, which asserts that the purpose of tort law is and should be *efficient* compensation and de-

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[6] *See, e.g.,* John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 664 (2001).

[7] *See generally* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM (Tentative Draft No. 5, 2007).

[8] *See* Stapleton, *supra* note 3, at 269.

[9] Professors Goldberg and Zipursky are among the relatively few who have refreshingly refused to fall into this trap. Goldberg has plausibly identified five broad schools of thought on tort law within the industrial era, and yet still admits that those within each school often disagree with one another. *See* John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 514 (2003).

[10] *See generally*, ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 145 (1995).

[11] *See generally*, Richard W. Wright, *Right, Justice, and Tort Law, in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW (David G. Owen ed., 1995).

> terrence, and (2) the Kantian-Aristotelian theory of Right or justice, based on the foundational norm of equal individual freedom, which asserts that the purpose of tort law is and should be *just* compensation and deterrence.[12]

This assertion of a binary division within tort law scholarship has tended not to be so fashionable in England.[13] However, a recent book by English law professor, Robert Stevens, suggests that this malaise has now crossed the Atlantic.[14] Like Weinrib and Wright, Stevens sees tort theorists as belonging to one of two camps, although his own asserted dichotomy is a little different from Wright's. Stevens conceives of a cleavage between, on the one hand, those who consider tort law to be concerned with loss and its consequences and, on the other, those who believe that it is about the protection of rights. As the latest example of the tendency among scholars to assert a binary division in tort law theory, Stevens's "twist" to this dichotomy arguably takes this approach to even greater extremes than his predecessors. It is difficult to find anyone else who believes, for example, that there really should not be any such thing as the tort of negligence.[15] Indeed, rather than shedding new light on the law of torts, all these "with-me-or-against-me" approaches have one unappealing feature in common: they paint a picture of the law which is simply unrecognizable to the non-believer.[16] Herein lies the problem. Instead of aiding the explanation or evaluation of the law of torts, statements of tort law theory are becoming more like affirmations of fundamentalist religion, in which theorists flaunt their piety by providing an ever-purer statement of the faith. Yet, as always, fundamentalist piety appeals only to fundamentalists.

This point of the article is not to argue with the set of values which underlie each fundamentalist version of tort law theory. That has been done many times before but has probably had less effect than might be imagined. Partly this is because critiques of one group of fundamentalists are often made by the fundamentalists of another group. Partly it is because fundamentalists are almost bound to pay no attention to criticism, so that the only audience prepared to listen is comprised of those who are already skeptical. This article, by contrast, is interested in taking the fundamentalist claims on their own terms and subjecting them to an immanent critique. In other words, this article is interested in exploring whether rights-based and economics-based fundamentalists actually make sense according to their own statements of faith. It concludes that they do not. Those who advocate them have often seriously misunderstood their own theories, resulting in theories which paint a rather mystical account of the law.

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[12] *Id.* at 160.

[13] *See, e.g.*, Peter Cane, *Justice and Justifications for Tort Liability*, 2 O.J.L.S. 30, 30 (1982) ("A[n] . . . approach, common among English writers, sees the law of torts as based on a number of different theories. . . .").

[14] ROBERT STEVENS, TORTS AND RIGHTS 2 (2007).

[15] *Id.* at 296, 303.

[16] *See* Stapleton, *supra* note 3, at 266-68.

Part II of this article treats Stevens's book as a case study in the flaws of fundamentalism. It demonstrates, in particular, how fundamentalism blinds theorists to what the law actually says. This blindness takes on two manifestations. The first involves failing to notice that countries which have similar laws, such as Australia, Canada, England and the United States, nevertheless do not have the same laws. Indeed, the point seems obvious, especially within the United States, where each state has its own body of tort law—and yet so much modern theory overlooks it. Stevens's fundamentalism makes him so oblivious to this fact that, although he focuses essentially on English cases, he is so confident in his theory that he feels able to declare that "the book would look much the same if I had primarily used the case law of any other common law jurisdiction."[17] Fundamentalism and arrogance are common bedfellows.

The second manifestation of blindness brought on by fundamentalism is the frequency with which too many theorists resort to re-writing or re-engineering the case law. This re-engineering often has implications which the theorists then overlook and which are actually the very opposite of what was intended. Stevens, it will be seen, sees individual rights as the foundation of tort law rather than its product. Yet not only does this put the cart before the horse, his analysis actually turns out to have the perverse effect of downgrading individual rights to bargaining chips which can be "trumped" by greater claims, including government policy. So a theory which promises greater individual autonomy and less government intervention proves instead to have quite the contrary implications.

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[17] STEVENS, *supra* note 14, at vii.

Part III attempts to see whether Stevens's analysis can be rescued at any level. Using a methodology originally developed by the German political philosopher and sociologist, Max Weber, it argues that the best way to understand Stevens's analysis is actually as a purely theoretical construct or "ideal-type" which facilitates both comparison with other explanations and the identification of trends in tort law.[18] Taken this way, however, it becomes clear that the law of torts is actually moving *away* from anything resembling Stevens's model. An alternative model is clearly required.

But, in case the blindness identified in Parts II and III is taken to apply only to the fundamentalism of rights theory (or of corrective justice theory more generally), Part IV offers an equivalent critique of the fundamentalism of economic analysis. Whereas rights are the ostensible object of Stevens's idolatry, what may be called "economism" worships at the altar of economic efficiency. Yet it is afflicted with the same extreme myopia. So economism's unitary view of tort law fails entirely to address differences between jurisdictions, such as those which still recognize joint and several liability as compared to those where that doctrine has (apart from vicarious liability) been abolished. While gods may work in mysterious ways, it is difficult to see why joint and several liability is efficient in one jurisdiction but not in another (or *vice versa*). Of course, this conundrum could be blamed on the meddling of politicians, if only so much of the legislation introduced to abolish joint and several liability had not been supported by the law-and-economics brigade. (If the common law of torts really does produce optimally efficient outcomes, it is not clear why it should need legislative assistance.) In any event, different rules in different jurisdictions are more commonly a product of the courts themselves. The circumstances in which a plaintiff may successfully recover damages for emotional distress is but one example of rules differing significantly from state to state, and from nation to nation, yet these differences are entirely a product of the courts themselves. It is hard to believe that what is efficient changes at exactly the geographical boundary that legal jurisdictions change. In other words, economic fundamentalism simply fails to acknowledge that the law has a certain degree of autonomy from external influences.

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[18] MAX WEBER, THE METHODOLOGY OF THE SOCIAL SCIENCES 90 (Edward A. Shils & Henry A. Finch trans., 1942).

Absolutely central procedural issues such as whether the questions posed by a particular tort doctrine are required to be decided by a judge or a jury are also entirely overlooked by fundamentalist economic theorists, so that an account of tort law is provided which makes it sound as though juries play a very minor role in the adjudication of tort law disputes. Yet we all know that this is very far from the truth. Moreover, this blind re-engineering of legal doctrine and procedure actually depends on a confusion of micro and macroeconomics. Just as Stevens's rights theory involves a parody of individual rights, economism suffers from the problem that it depends on a hopelessly muddled view of economics. Ironically, this re-engineering has the perverse effect of promoting a view which is the very opposite of Adam Smith's "invisible hand." As a result, the theory has more in common with the views of early Soviet legal theorists than with what could reasonably be expected of advocates of a free market.

Part V makes broader observations as to why the whole fundamentalist endeavor—whether based on rights or economics—is doomed to failure. It notes, in particular, that fundamentalism is effectively a form of reductivism. The law is reduced either to a matter of economics or to a matter of metaphysics. What fundamentalists fail to understand is that, on the contrary, the law is actually a body of relatively autonomous practices. These are not always driven by external forces so much as by the purely internal requirement that they are reasonably coherent and consistent. While the law of torts clearly has some relationship to matters of economics and ideas of rights, it is not reducible to either of these elements. Ironically, lay persons have little difficulty in distinguishing the law on the one hand from either rights or economics on the other. They may, for example, find that the law says that they have rights, but that these must yield in a particular case to the rights of others; or they may simply find that the cost of vindicating their rights through the law is simply too high to be worthwhile. In either case, these lay persons will be able to clearly distinguish what the law says from what their rights are, or from whether it is economically efficient for them to have the law confirm their legal position. The reason that the law is so clearly distinguishable from both rights and economics is, of course, that it takes on its own form. It will be argued that trends in the law of torts are often attributable to the ways in which that form mediates these external influences.

There is, however, no point in throwing out the baby with the bath water. There can be no doubt that tort law has been, and continues to be, shaped and influenced by ideas of rights and justice on the one hand, and by economic considerations on the other. Nothing in this paper should be taken as questioning that truism. What is rejected is the view that, at its root, the law of torts is fundamentally about one set of preoccupations rather than the other. Tort law, like the society which it seeks in some way to regulate, is much more complex than that. Simplistic, fundamentalist theories fail to capture what attorneys and courts do or what the general public would recognize. On the other hand, trying to combine these opposing schools of thought is likely to degenerate into some internally incoherent compromise theory. While proposing a movement away from the reductivist approach of fundamentalism, this section also advocates steering away from a bi-dimensional approach which still fails to allow for any degree of legal autonomy. It proposes instead a broader, three-dimensional framework. The previously discussed external influences comprise the first dimension. The second is the law's own form. The third is the dimension of time. Only by seeing the law of torts as a series of trends is it possible to incorporate the insights of both the law-and-economics and rights or corrective justice schools so as to provide a meaningful theory of tort law without at the same time resorting to some hopelessly unworkable compromise within and between the other two dimensions.

II. A CASE STUDY IN FUNDAMENTALISM

A. Two Conceptions: Neither Immaculate

Stevens opens his book with the following revelation: "Two incompatible conceptions of the law of torts are discernible within the common law."[19] He continues:

> The first, and probably dominant, conception is that the defendant should be liable where he is at fault for causing the claimant loss unless there is a good reason why not. . . . There is another conception of the law of torts. . . . A wrong is a breach of a duty owed to someone else. A breach of a duty owed to someone else is an infringement of a right they have against the tortfeasor. . . . The law of torts is concerned with the secondary obligations generated by the infringement of primary rights.[20]

There are a number of problems with this formulation. It is telling indeed that Stevens does not identify which theorists believe in which "conception." More fundamental is the fact that, in claiming that all reputable theorists hold to one or the other of these two conceptions, Stevens has failed to provide proper correspondence between them. Thus his depiction of the "loss conception" gives it three elements: (1) wrongdoing, (2) loss, and (3) the absence of an affirmative defense. But his "rights conception" only has one: wrongdoing. While the omission of loss (or of any synonym for, or analogy with, loss) is entirely explicable given the very nature of the distinction between the two models, Stevens's failure to include "absence of an affirmative defense" (or of anything resembling it) as an element required by the rights conception means that his characterization is both inaccurate and misleading. It suggests that, while those who believe that tort law is about liability for the causation of loss also believe that such loss can sometimes be excused or justified, those who adopt the "rights conception" make no such concessions. In other words, the latter group apparently believes that rights are inviolable.

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[19] STEVENS, *supra* note 14, at 1.

[20] *Id.* at 1-2.

Yet, as will become clear later, this could hardly be further from the truth. Indeed, it transpires that Stevens actually believes that rights can be overridden in a wide variety of circumstances, including through the exercise of privilege by government representatives. It is hard to imagine other rights and corrective justice theorists, like Ronald Dworkin or Ernest Weinrib, taking this view. It is thus not at all clear whether any other theorists would wish to join Stevens in his own "rights conception." So his assertion of a dichotomy between the "rights" and "loss" conceptions may well put only Stevens in the former camp, while the latter must encompass a very broad church indeed. Self-confidence is a wonderful thing, but such asymmetry must cast doubt on whether Stevens has really identified an important fault-line in tort law theory after all.

Moreover, this disinformation about affirmative defenses is not the only instance of a lack of appropriate correspondence in Stevens's comparisons between his two theoretical constructs. This raises suspicions that he is simply using the idea of a "loss conception" to construct a theoretical straw man. When discussing the comparative requirements regarding the elements of wrongdoing and harm, he claims that:

> On [the] rights-based model there are two questions: 'has the defendant infringed a right of the claimant?' and 'what loss to the claimant (or gain to the defendant) is consequent upon the infringement of the right?' The one question required by the loss-based model is 'has the defendant caused the claimant loss (or himself gain) by his reprehensible actions?' This appears deceptively more straightforward, but in many cases proves almost impossible to answer . . . .[21]

Yet a moment's reflection shows Stevens's distinction to be hopeless. If the "loss-based model" is not to be a mere caricature, there are actually two questions at work there too. It is just that his phrase "reprehensible actions" simply presupposes that the first question has already been asked and answered. Unpacking this phrase reveals that the two questions to be addressed are: (1) has the defendant behaved in a reprehensible manner? And, if so: (2) what loss to the claimant (or gain to the defendant) is consequent upon that behavior?

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[21] *Id.* at 133.

Stevens maintains that the one question involved in the "loss conception" "in many cases proves almost impossible to answer" so that it is hopelessly imprecise and open to abuse.[22] But now that it can be seen that the "loss conception" really involves the *two* questions, (a) and (b) above, it is difficult to see why it is any less practicable than Stevens's preferred "rights conception." Stevens may not like the economists' answer to question (a), which would see it turn on some Posnerian interpretation[23] of the Learned Hand formula from *United States v. Carroll Towing Co.*,[24] but it is hard to see why cost-benefit analysis should be any more problematic in practice than identifying the existence and ambit of specific rights. Stevens himself is completely unable to provide a meaningful guide as to what the relevant rights may be, and he is scarcely more able to explain how they should be applied. His list of "rights" to be covered in a textbook written to his own specification is a veritable hodgepodge, and yet still includes a heading called "Rights—Other" in case he might have omitted some.[25] So if the "loss conception" is deceptively impracticable, then his preferred "rights conception" suffers from precisely the same problem.

In fact, however, Stevens's "loss conception" *is* a caricature. Even though his original articulation of the loss-based approach has now been unpacked to reveal two distinct questions, it is still not an accurate depiction of any reputable theorist's approach to tort law. A vital third ingredient—that of obligation or a duty of care—is still missing. It is as if Stevens is attempting to accuse all those who disagree with him of employing Judge Andrew's analysis in *Palsgraf v. Long Island Railroad Co.*[26] to the whole of tort law. Yet Judge Andrews himself went nowhere near that far. He actually said: "Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others."[27] "Safety" is a concept clearly confined to protection from physical harm. There is nothing here to support the idea that anyone who causes harm, *no matter what its form*, to someone else is potentially liable to pay compensation for so doing. Whether the harm caused is to another person's mental equilibrium, enjoyment of land or reputation, etc., no apparent advocates of the "loss conception"—including advocates of economic analysis[28]—dispute that the defendant must have owed the plaintiff a legal duty in order to be found liable. Indeed, the difference in the approaches between Section 7 and Section 37 of the latest Restatement of Torts rests precisely on this distinction between types of harm. Section 7 deals with physical harm and presumes that a duty is owed (as Judge Andrews argued in *Palsgraf*); Section 37 deals with other types of harm and presumes that no duty is owed. But these presumptions are rebuttable so that, even in circumstances where Section 7 applies, a court may find that the presumption is rebutted and that no duty in fact existed, despite the fact that the case before it is one where physical harm is alleged. New York plaintiffs, of course, must always prove that they were owed a duty of care because Chief Judge Cardozo's majority opinion in *Palsgraf* is still good law there; and such proof is also always required in Robert Stevens's own jurisdiction in England and Wales.[29] Moreover, the requirement that some form of duty has to be owed by the defendant to the plaintiff in order for the former potentially to become liable to the latter becomes even clearer when other torts are implicated such as premises liability, trespass, nuisance or a dignitary tort. So (even without considering any affirmative defenses) any meaningful version of the "loss conception" must actually ask three questions: (1) did the defendant owe the plaintiff a duty? If so, (2) has the defendant behaved in a reprehensible manner? and, if so, (3) what loss to the claimant (or gain to the defendant) is consequent upon that behavior?

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[22] *Id.*

[23] *See generally*, Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32 (1972).

[24] United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d. Cir. 1947) ("if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B is less than PL").

[25] STEVENS, *supra* note 14, at 303.

[26] Palsgraf v. Long Island R.R., 162 N.E. 99, 101 (N.Y. 1928).

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[27] *Id.* at 103 (Andrews, J., dissenting).

[28] *See, e.g.,* Hylton, *supra* note 5, at 1501.

[29] Marc Rich & Co. A.G. v. Bishop Rock Marine Co. Ltd., (*The Nicholas H.*) [1996] A.C. 211, 235 (H.L.) (citing with approval Marc Rich & Co. A.G. v. Bishop Rock Marine Co. Ltd. The Nicholas H. [1994] 1 W.L.R. 1071, 1077 (C.A.)).

It now becomes clear that, far from being mutually exclusive, the "loss conception" and Stevens's preferred "rights conception" overlap to a very large extent. One focuses on the rights of the plaintiff, the other on the duties of the defendant. Many scholars would argue that these are, in fact, just different ways of asking the same question. Since rights correlate with duties, focusing on one rather than the other simply changes the perspective, not the central issue.[30] Indeed, it is submitted that, if anything represents the dominant view in the United States today, it is a hybrid of Stevens's two conceptions, which effectively joins both perspectives together.[31] In other words, a defendant is typically said to be liable in the law of torts if—and only if—he *both* violates someone else's rights *or* breaches a legal duty *and* thereby causes that person harm. Thus the causation of harm is not by itself the basis for a successful claim, but neither is a violation of a right where no harm has been done.

The same point can be made even more clearly if we reconsider what is now question (2). What exactly does "reprehensible" mean here? One possibility has already been suggested: it could mean the failure to take steps which a cost-benefit analysis would have shown to be prudent.[32] But since the number of scholars who might be identified with the (increasingly artificial) "loss conception" is so large and varied, there is every reason to believe that this question could be answered in many different ways. It could, for example, be viewed as the breach of certain social norms or responsibilities.[33] Or it could be seen simply as the cost to be borne for engaging either in risky activity *per se*,[34] or in unexcused, non-reciprocal risk-taking.[35] But equally, there is absolutely no reason why it could not be considered as the violation of another person's rights. Richard W. Wright has declared, for example, that:

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[30] *See, e.g.*, Ernest J. Weinrib, *The Disintegration of Duty*, *in* EXPLORING TORT LAW, *supra* note 3 at 143, 154-55.

[31] *See, e.g.*, JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 38-40 (2001).

[32] *See, e.g.*, Posner, *supra* note 23, at 32.

[33] *See, e.g.*, JOHN C.P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 38-40 (2004).

[34] *See, e.g.*, GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 89 (1970).

> The question, then, is what type of losses should be compensated. . . . To answer this question, we must know the normative ground of compensation. . . . I believe . . . that the equal freedom theory . . . underlying the concepts of Right and justice . . . and its constituent concept of corrective justice undergird the general structure, content and institutions of tort law.[36]

So Stevens's assertion of a fundamental incompatibility between the "loss conception" and the "rights conception" turns out, on closer inspection, to be mythical. Attempts to furnish a theory to explain current tort law which assert meaningless distinctions are likely not so much to assist that endeavor as to bring it into disrepute.

B. Substituting for rights

Clinging to the wreckage of the "rights conception" leads to a second misunderstanding. Stevens maintains that a claim for damages amounts to the assertion of a secondary right as a substitute for the primary right (e.g., of bodily safety, property, reputation, etc.) that has allegedly been infringed.[37] In one sense, his argument is trite. It is obvious that the receipt of damages comes a poor second to not being injured in the first place. It is also obvious that awards of damages are designed to compensate for the fact that a tort has been visited upon the plaintiff. Stevens, however, wants to go further and argue that a person's rights are the cornerstone of the law of torts, so that awards of damages are designed to compensate not for any harm sustained but for the loss of those rights. This is the real nub of the distinction between his "rights conception" and the supposed "loss conception," since the latter sees payments of

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[35] *See, e.g.*, George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 544-45 (1972).

[36] Wright, *supra* note 11, at 159-60.

[37] STEVENS, *supra* note 14, at 59-62.

damages as being designed to compensate victims for the amount of harm suffered.

Once again Stevens has taken a step too far. Even if the most appropriate way to characterize the law of torts is to say that it involves a breach of someone else's rights, it does not follow that the measure of damages to be paid for such a violation must be equal to the value of the right itself. Indeed, it turns out that Stevens does effectively concede the point for a large number of torts cases. He says, for example, that "in principle . . . [the law] requires proof that the claimant was factually worse off as a result of the infringement of the right."[38] This begs the question of why the two conceptions exist. One answer is that Stevens believes that the notion of loss fails to account for damages paid to plaintiffs when they have not apparently suffered any loss, such as the rights to damages in defamation or in trespass to land when no consequential harm is proven:

> In the assessment of damages it is necessary to distinguish between damages awarded as a substitute for the right infringed and consequential damages as compensation for loss to the claimant, or gain to the defendant, consequent upon this infringement.[39]

Whereas consequential (essentially economic) damages, such as loss of income and cost of health care, are assessed according to circumstances specific to the particular victim, what Stevens calls "substitutive damages" are (he says) assessed objectively according to the nature of the right for which they are a substitute, "save where the infringement is particularly egregious."[40]

However, this argument suffers from a fatal flaw concerning the very notion of substitutive damages. In the vast majority of cases, the concept can have no relevance. After all, unless killed or paralyzed,[41] the victim does not usually lose any rights;

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[38] *Id.* at 59.

[39] *Id.* at 60.

[40] *Id.* at 60.

[41] In *Chester v. Afshar*, the House of Lords in England held that the paralyzed victim of medical malpractice lost forever the right to defer treatment or to choose a differ-

and, paradoxically, where rights truly are lost, their value is assessed precisely by considering the degree of *harm done to the plaintiff*. Indeed, the plaintiff may not even be the same as the person whose rights were originally infringed. A wrongful death action, for example, involves a claim by the financial dependants of the decedent for the injury *they* have suffered, not for the value of the loss of rights of the decedent.[42] In any event, as already noted, the vast majority of claims do not involve the loss of a right but its alleged *infringement*. Someone injured in a car wreck still retains any right to bodily integrity (or personal dignity or autonomy) which she had before the accident. The issue which is the subject of her claim against the tortfeasor is not that her rights have been lost, but that they have been violated. Any award of damages therefore reflects the degree of violation: in other words, the amount of harm done. It is the same with an act of trespass or defamation. In either case the victim does not lose her right to quiet enjoyment of her property or to her reputation. There is no question of seeking "substitutive" damages because no right has been lost for which they can substitute; the plaintiff simply seeks compensation for degree of intrusion or harm suffered.

In any event, it is difficult to know what the concept of "substitutive damages" could actually mean in practice. Once we accept the idea of legal rights, we must also accept that they are enjoyed by every citizen. Since every citizen is equal before the law, every citizen's rights must have the same value. Thus (after allowing for inflation) recompense for the violation of one person's rights must be worth the same as any other's for violation of the same rights within the same jurisdiction. Yet it takes only a cursory glance at awards of damages to realize that this does not reflect reality. Indeed, it entirely misrepresents not just the substance of awards made but also the process by which those awards are assessed. If damages were, in a significant number of cases, really about compensating the plaintiff for vi-

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ent doctor. [2004] UKHL 41, [2005] 1 A.C. 134 (H.L.), *available at* http://www.publications.parliament.uk/pa/ld200304/ ldjudgmt/jd041014/cheste-1.htm.

[42] For the United States, see RESTATEMENT (SECOND) OF TORTS § 925 (1965); for the United Kingdom, see Fatal Accidents Act, 1976, c. 30, §§ 1(3), 3(1).

olation of a legally-protected right *per se* rather than about the amount of harm caused thereby, then surely this would be a matter of law to be addressed by the judge rather than a matter of fact for a jury. That would, after all, be the only way of ensuring that each violation led to the same award regardless not only of the identity or status of either party but also of any other circumstances. Yet in the United States, the assessment of damages is still left to the jury.

Even in England, where juries rarely sit in tort cases, the "tariff" of compensation on which the final award by the trial judge is based revolves around the amount of harm done, not the nature of the right violated.[43] Whether the injury suffered is done to the head, hair, skin, joints, limbs or internal organs, the right identified by Stevens which is infringed in each case is the same: the right to bodily safety.[44] Yet the *Guidelines for the Assessment of General Damages in Personal Injury Cases* do not even stop at distinguishing between these types of injury. They go further and differentiate between, for example, hand and wrist injuries, or between a minor head injury and epilepsy.[45] It should be emphasized that the *Guidelines* do not deal with consequential losses, such as loss of income, which even Stevens agrees are assessed according to the magnitude of harm sustained by the individual victim. The *Guidelines* refer only to what in England and Wales are called "general damages," namely, damages to be awarded to mark the fact that a tort involving bodily injury has been committed; they are awarded *in addition to* any damages for consequential loss. If anything were to represent Stevens's "substitutive damages," it would be the *Guidelines.* And yet they do nothing of the sort. No matter how elegant, any theory of torts which cannot account for the process and calculation of awards of damages inevitably leaves something to be desired.

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[43] *See* Lord Donaldson of Lymington, *Forward to the First Edition* of JUDICIAL STUDIES BOARD, GUIDELINES FOR THE ASSESSMENT OF GENERAL DAMAGES IN PERSONAL INJURY CASES, at ix (8th ed. 2006).

[44] STEVENS, *supra* note 14, at 5.

[45] JUDICIAL STUDIES BOARD, *supra* note 43, at 9, 36.

C. Rights Gone Wrong

The arguments discussed so far have all been advanced by Stevens as "conceptual" and "functional" claims.[46] In other words, he has proffered them as explanations of what tort law means and the purposes it serves. They have, however, been found wanting in both respects. But there is a third string to his bow, by which the "rights model" purports to explain the history of the law of torts. Taking as his starting-point the judgment of Judge Cave in the nineteenth-century English case of *Allen v. Flood*,[47] Stevens argues that, as a matter of historical fact, the law of torts has identified certain rights which are to be protected. These are rights of reputation, of bodily safety and freedom, and of property;[48] public rights (such as the right to use the highway),[49] rights created by an undertaking outside the law of contract,[50] family rights,[51] "correlative" rights (such as the rights of visitors, which correlate with landowners' rights to exclusive possession of their property[52]) and statutory rights.[53]

Yet even this list is highly problematic. The common law of torts is not a fixed body of rules which one day set out the rights it would protect and then refused thereafter ever to countenance any others unless they were imposed upon it by legislation. Nor are these (or any other) rights protected by one overarching tort. Anyone making this sort of argument must therefore be careful to explain and justify the quirks and niceties of each specific tort. Stevens is effectively lumping together, among others, the torts of defamation, negligence, trespass (both to person and to property), nuisance (both public and private) and premises liability.[54] So he needs to explain, for example, why—according to English law—there is a defense of qualified privilege in defamation but not in negligence when both torts can be applied to the same set of facts.[55] Yet he does not do so.

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[46] *See* Goldberg, *supra* note 9, at 515.

[47] Allen v. Flood, [1898] 1 A.C. 1, 29.

[48] STEVENS, *supra* note 14, at 5.

[49] *Id.* at 8.

[50] Which could alternatively be called assumption of responsibility. *See id.* at 9-14.

[51] *Id.* at 15.

[52] *Id.* at 15-16.

[53] *Id.* at 16-17.

[54] Premises liability is known as occupiers' liability in England. *See* Occupiers' Liability Act, 1957, c. 31, § 1, sched. 2; Occupiers' Liability Act, 1984, c. 3, § 1, sched. 2.

This defense effectively permits a defendant to injure another person's reputation by means of a written communication in circumstances where both writer and recipient have an interest in that communication, such as in the provision of a reference, so long as the tort alleged by the plaintiff is defamation.[56] No such defense has ever been permitted, however, by the tort of negligence. Historically, the right to reputation was protected by the tort of defamation. But this does not explain how and why the same facts may nowadays support an allegation of negligence too, so that a plaintiff in England can effectively avoid having the defendant plead the defense of qualified privilege by suing in negligence instead.[57] Yet this inadequacy in Stevens's approach is minor in comparison to the problem posed for him by American tort law, which has moved in precisely the opposite direction. The American approach means that the right to reputation—formerly given the protection which it now enjoys in England[58]—is now essentially overridden by the First Amendment right to freedom of speech.[59] Yet Stevens says expressly that "we do not have a 'right' . . . to freedom of expression."[60] His approach is simply ahistorical.

While a theory of torts based essentially on rights might be able in principle to explain a snapshot of legal history, it will inevitably struggle to show how the common law has changed and developed over time, especially when the tort historically connected with protecting a given right is effectively being usurped either by an alternative tort or by a new application of constitutional law. The emergence of the tort of negligence on both sides of the Atlantic has, for example, steadily undermined the claims of the dignitary torts of assault and battery to be the protectors of the right to bodily safety. Stevens's "rights conception" cannot explain this trend since the right remains constant while the legal means of protecting it has changed considerably. Similarly, the rule in *Rylands v. Fletcher*[61]—which created a tort which is often championed as a significant defender of property rights—has suffered a slow and agonizing death in England at the hands of the torts of nuisance and negligence;[62] yet Stevens's theory is again unable to explain it.

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[55] Spring v. Guardian Assurance Plc., [1994] UKHL 7, [1995] 2 A.C. 296 (H.L.), *available at* http://www.bailii.org/uk/cases/UKHL/1994/7.html. American law used to arrive at a similar result by saying that the defense of qualified privilege in defamation could be defeated by proof of negligence. *See* RESTATEMENT OF TORTS § 601 (1938). Now, however, constitutional ideas of free speech have been held to trump any allegations of wrongdoing where the latter has not been the product of deliberate malice. *See* RESTATEMENT (SECOND) OF TORTS § 600 (1977).

[56] Watt v. Longsdon, [1930] K.B. 130, 142 (C.A.), per Scrutton, L.J.

[57] *Spring*, [1995] 2 A.C. 296.

[58] RESTATEMENT OF TORTS § 601 (1938).

[59] RESTATEMENT (SECOND) OF TORTS § 600 (1977).

[60] STEVENS, *supra* note 14, at 5.

Moreover, even if we ignore the law of negligence in the context of the right to reputation and consider only the law of defamation, the ramifications of Stevens's own explanation for the existence of the defense of qualified privilege are of even greater concern. The problem that he must address is that, if someone is effectively entitled to ruin another person's reputation in the very circumstances where it is most likely to do serious harm—in the giving of a reference—then can this apparent "right" of reputation really be characterized as a "right" at all? Stevens's answer is to say that it is indeed a right, but that it is overridden by the privilege of the person making the statement.[63] An important feature of a privilege—as opposed to a right—is that it "is a liberty persons generally do not have"[64]—and, says Stevens, it is not confined to the law of defamation. He gives other examples taken from the laws of nuisance, negligence and ultra-hazardous activity.[65]

This explanation opens the most objectionable can of worms because it tells us nothing about the way in which these privileges are created or obtained. Rights are enjoyed by all citizens, simply by virtue of their existence. But privileges are not. We therefore need to know who has these privileges; and how, when and why they are acquired. Unfortunately, Stevens completely fails to address any of these issues. The closest he comes is in offering a brief account of the limits of certain privileges.[66] But asserting that there are limits to them tells us nothing about how, where, when and to whom they accrue in the first place. Most alarmingly, Stevens believes that such privileges can accrue to those working for government.[67] His theory now begins to unravel. His "rights model" is ostensibly intended to assert that the essence of the law of torts is its protection of a series of individual rights. These rights are supposed to act as claims on—and defenses against—other individuals and institutions, including government. Yet it now turns out that this model actually facilitates the common law's tolerance of government attempts to attenuate or undermine those very rights. It might be appropriate to say that government is free to limit rights, other than Constitutional rights, by means of legislation. But to allow individual rights to be cut down through the common law in this indeterminate manner is the very antithesis of any recognizable rights-based approach. Whereas Ronald Dworkin, for example, believes that rights "trump" policy,[68] Stevens's own "rights model" enables privilege to trump rights.

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[61] [1868] UKHL 1, *available at* http://www.bailii.org/uk/cases/UKHL/1868/1.html.

[62] Cambridge Water Co. v. E. Counties Leather Plc., [1994] 2 A.C. 264, 264.

[63] STEVENS, *supra* note 14, at 105-106.

[64] *Id.* at 103.

[65] *Id.* at 103-107.

As already noted, Stevens leaves open to conjecture an explanation of the type of circumstances which may create a privilege to attenuate or undermine rights. Implicit in his account, nevertheless, seems to be some notion that such privilege may arise in situations of emergency. He explains *Vincent v. Lake Erie Transportation Co.*[69] in this way. There the crew of the defendant's ship lashed the vessel to the plaintiff's dock without permission in order to keep it safe during a storm.[70] The court held that they had acted lawfully in so doing, but that the defendant was required to compensate the plaintiff for the damage done to the dock as a consequence.[71] Stevens's explanation is that the owner of the dock had a right to peaceful and exclusive enjoyment of his property, but that the emergency gave the crew a privilege to override that right. However, that privilege did not extend to absolving the owners of the vessel from responsibility for the "damage suffered as a result of its exercise."[72] But not only is this explanation for the case at variance with that given by the court in *Vincent* itself, it is strangely perverse for someone who has been denigrating a supposed "loss conception" of the law of torts in favor of a "rights conception." It effectively suggests that the law is keener to protect plaintiffs from loss than it is to protect their rights. In other words, Stevens's explanation looks more like an argument in favor of the "loss conception."

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[66] *Id.* at 103-107.

[67] *Id.* at 105.

[68] Ronald Dworkin, *Rights as Trumps*, *in* THEORIES OF RIGHTS 153, 153 (Jeremy Waldron ed., 1984).

[69] 124 N.W. 221, 221 (Minn. 1910).

[70] *Id.*

[71] *Id.* at 222.

In any event, this account hardly explains the doctrine of qualified privilege in defamation, where there is no question of emergency, let alone how some cricketers in England acquired (according to Stevens) a privilege to hit cricket balls into a neighbor's garden (albeit that, as in *Vincent*, they had to pay for any damage they caused).[73] Stevens says that the case which he cites on this last issue, *Miller v. Jackson*,[74] is a "difficult case on the margin,"[75] but are we really to suppose that those pursuing a leisure activity may accrue a privilege to trespass over another person's land? If so, and if "the book would look much the same if [he] had primarily used the case law of any other common law jurisdiction,"[76] then it must presumably be the case that throughout the United States, those playing baseball acquire a privilege to trespass on their neighbors' property. Unfortunately for Stevens, American case law simply does not fit his theory.[77] In fact, he is scarcely on firmer ground when confined to the shores of the United Kingdom. Perhaps the best potential justification for the notion that the cricketers acquired a privilege in *Miller* is that they had played at the same venue for seventy years.[78] However, an activity of considerably greater longevity within the UK is that of riding to hounds. Yet English law does not entitle participants to ride over land owned by someone who has not given permission.[79] The attempt to explain *Miller* on the basis of some mystical acquisition of privilege just does not work.

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[72] STEVENS, *supra* note 14, at 104.

[73] Miller v. Jackson, [1977] EWCA (Civ) 6, *discussed in* STEVENS, *supra* note 14, at 105.

[74] [1977] EWCA (Civ) 6, *available at* http://www.bailii.org/ew/cases/EWCA/Civ/1977/6.html.

[75] STEVENS, *supra* note 14, at 105

[76] *Id.* at vii.

[77] *See, e.g.,* Hennessy v. Boston, 164 N.E. 470, 471 (1929) (holding that hitting baseballs onto Plaintiff's property as well as entry onto property to retrieve balls constituted trespass and nuisance). The law takes much the same view about the incursion of golf balls. *See, e.g.,* Fenton v. Quaboag Country Club, Inc., 233 N.E.2d 216, 219 (Mass. 1968) (holding that residential property owners living adjacent to golf course were entitled to injunction to prevent operation of one hole of the golf course and to abatement of trespass by flying golf balls falling on Plaintiff's premises); Amaral v. Cuppels, 831 N.E.2d

This leads us on to what is probably the most fundamental problem with Stevens's "rights model." Surely the whole point of the rhetoric of rights is that it implicitly demands the assistance of the law in protecting those rights. Philosophies of rights take their power from the idea that a right is an individual claim on the instruments and institutions of government—whether executive or judicial—to protect and enforce something deemed fundamental to our way of life. When raised to the level of Constitutional rights, they can even be bulwarks against legislative incursion. If these so-called "rights" can, however, be undermined from time to time by someone else's "privileges"—especially when those privileges can be conferred on government employees—then it follows that the legal system does not, after all, consider rights to be fundamental. According to Stevens's analysis, individual rights are effectively reduced to bargaining chips; if someone with a stronger claim comes along, they will necessarily be sacrificed.

A simple example should suffice to demonstrate just how far from any recognizable "rights model" this takes us. According to both domestic and international law, torture is apparently prohibited,[80] which Stevens can support by relying on his

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915, 918 (Mass. App. Ct. 2005) (holding that recurring entry of golf balls onto Plaintiff's property constituted continuing trespass).

[78] *Miller*, [1977] EWCA (Civ) 6 (Lord Denning MR).

[79] *See, e.g.,* DEPARTMENT FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS, THE FINAL REPORT OF THE COMMITTEE OF INQUIRY INTO HUNTING WITH DOGS IN ENGLAND AND WALES, 2000, Cm. 4763, at 146-56, *available at* http://www.huntinginquiry.gov.uk/mainsections/report.pdf.

[80] *See, e.g.,* Universal Declaration of Human Rights, G.A. Res., 217A, at 73 U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948); Council of Europe, European Convention on Human Rights and Fundamental Freedoms, art. 3, Nov. 4,

claim that there is a right to bodily safety. But what if a government were to torture suspected terrorists because it claimed that it could thereby extract information vital to the immediate protection of its citizens? This could certainly be said to be an example of an emergency. Stevens's analysis clearly enables courts to read into both the legislation and international instruments a privilege for would-be torturers in such circumstances. At this point his "rights model" suddenly disintegrates into pitiless irony: it becomes a model that actually legitimizes wrongdoing. Dworkin's "rights thesis," for example, would emphatically reject the legitimization of torture as entirely contrary to the principle of equal concern and respect.[81] But Stevens's list of rights enforced by the common law has no underlying theme to it. He offers no overall benchmark of what it is that turns certain interests into rights worthy of legal protection. He is thus left either to countenance torture or else to stand idly by, keeping his fingers crossed that no court would actually be persuaded that the practice of torture can in some circumstances be considered a privilege. Either way, his rights model turns out not to protect individual rights at all, but to legitimize their destruction.

D. Orthodoxy and Nuance

A more orthodox analysis of qualified privilege goes along the following lines. In the case of a potentially defamatory reference, the person whose reputation is at stake has an interest in that reputation. This interest may at times be in competition with the interest in free speech of the person sending the reference and/or with the reliance interest of the recipient who needs to know that the statement is made honestly and without fear

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1950, 213 U.N.T.S. 221 [hereinafter ECHR]; International Covenant on Civil and Political Rights, art. 7, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966); Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 113; U.S. CONST. amends. V, VIII, XIV; 18 U.S.C. § 242 (making it a criminal offense for any public official willfully to deprive a person of any right protected by the Constitution or laws of the United States).

[81] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 82, 364 (1977); RONALD DWORKIN, A MATTER OF PRINCIPLE 198 (1985).

or favor. The law is then required to engage in some sort of balancing exercise which considers the relative weights of these interests before deciding which should prevail. That balancing exercise has yielded different results in different jurisdictions within different eras. Nowadays, American law has chosen to prefer the interests of the referee over those of the person whose reputation is at stake, unless the latter can show that the former acted with malice.[82] But the fact that the balancing exercise has led to different answers at different times and in different jurisdictions demonstrates that, contrary to Stevens's assertion, it is not—and never has been the case—that the person making the statement is exercising a privilege, but that the *occasion* of the statement is privileged.[83] In this sense, use of the word "privilege" indicates not some special "über-right" gained through mythical means by a lucky individual. It instead signifies a factual matrix in which individual rights will normally be in conflict, but where the law has already settled their hierarchy. In cases of qualified privilege, such as the provision of a job reference, this hierarchy takes the form of a rebuttable presumption: the right to free speech beats the right of reputation unless the former is maliciously abused. However, in cases of absolute privilege—interestingly, omitted completely from Stevens's analysis—the law has taken a conclusive view which cannot be rebutted. Thus statements in court and in legislatures on both sides of the Atlantic are immune from a claim for defamation because the right of free speech has always been deemed to be more important in those forums than the right to reputation (especially since judges and legislators can be expected to police their own respective domains with due vigor).

Stevens cannot take this position because he believes that "we do not have a 'right' at common law to freedom of expression."[84] Now this statement is probably accurate if taken literally, because the right to freedom of expression is usually taken as emanating from sources like the US Constitution[85] or international treaties[86] rather than from the common law. But so what? Later in the same chapter Stevens includes among the rights protected by the law of torts some rights created by statute.[87] Within the United Kingdom there is thus no reason for excluding the right to freedom of expression since, although originally expressed in the European Convention on Human Rights,[88] this right has since been incorporated into domestic British law by legislation.[89] And if legislative rights count as meaningful rights in tort law, it is difficult to understand why Constitutional rights such as the First Amendment of the US Constitution should not be at least as significant. Indeed, Stevens himself criticizes an Australian judge who attempted to explain the otherwise inexplicable outcome of a case by resorting to such pedantry.[90] As he rightly says, "a wrong is a wrong, regardless of whether the duty is imposed by the common law or legislation."[91] For the purposes of the current discussion, therefore, whether the right to freedom of expression was originally a creature of the common law is, therefore, simply irrelevant.

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[82] *See, e.g.*, Toker v. Pollak, 376 N.E.2d 163, 166 (N.Y. 1978) (holding that qualified privilege negates the presumption of implied malice and placing the burden of proof on that issue on the Plaintiff).

[83] Adam v. Ward, [1917] A.C. 309, 334 (H.L.).

[84] STEVENS, *supra* note 14, at 5.

More germane to an understanding of Stevens's approach is his view that what appears to be a "right" to freedom of expression is not really so but is in fact a liberty carved out as a *consequence* of other rights. Thus, for example, the right to bodily safety means that no-one can use physical violence to stop me from saying what I choose.[92] The problem is that this characterization is no more than a half-truth. The right to freedom of expression is not just a liberty but can indeed extend to a claim on the instruments and institutions of government, as well as potentially to a claim on other private individuals. Within the

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[85] U.S. CONST. amend. I.

[86] ECHR, *supra* note 80, art. 10.

[87] STEVENS, *supra* note 14, at 16-17.

[88] Council of Europe, *supra* note 80, art. 10.

[89] Human Rights Act, 1998, c. 42, § 6 (Eng.).

[90] Judge Fullager declared in *Darling Island Stevedoring & Lighterage Co. v. Long* that: "It is a misuse of a term with a long-established meaning to call a breach of a statutory duty a 'tort.'" (1957) 97 C.L.R. 36, 56 (Aust.), *available at* http://www.austlii.edu.au/au/cases/cth/HCA/1957/26.html.

[91] STEVENS, *supra* note 14, at 264.

[92] *Id.* at 5.

United Kingdom, for example, every broadcaster has a legal obligation to deal with controversial political and current affairs issues with "due impartiality."[93] Inevitably this means that, once one view on such a topic has been aired, the broadcaster is compelled to provide space for a different view (although this does not have to be done mechanistically and some element of editorial judgment is acceptable).[94] Similarly, in the United States, where a public forum is taken to exist—such as at a city auditorium—the production of a musical cannot be suppressed on the grounds of good taste, which effectively means that a municipal board managing the auditorium must make the venue available for the production.[95] Clearly, this situation is not a product of other rights, such as the right to bodily safety, reputation or property: it involves a direct claim on a government institution. Resolution of an issue like this is thus the product of nuanced decision-making—including, most importantly, a decision as to what constitutes a public forum—which balances various other rights against the right to freedom of expression. The only way that Stevens's analytical framework could cope with this would be if he were to take a position diametrically opposite to the one that he does. He would have to say not that the right to freedom of expression is simply a liberty created by other rights, but that it is in fact a privilege which trumps those rights. But not only would he then be faced with having to articulate the source and circumstances of such a privilege, he would also have to explain why it is something not enjoyed by all citizens alike.

These theoretical contortions are all avoided by the orthodox explanation. Its relative simplicity has the added benefit of providing what appears to be a more accurate depiction of the law. But perhaps of even more significance is the fact that it does not place anything above individual rights. Instead, when such rights apparently conflict, it requires courts to engage in thoughtful, nuanced reasoning in order to resolve disputes. Thus, *Vincent v. Lake Erie Transportation Co.*[96] is not about the creation of some privilege, but about the balancing of the rights to life and property of the defendant and its crew as compared with the right to exclusive enjoyment of land by the plaintiff landowner. Such balancing does not take place in the abstract but in the context of the particular facts of the case, and includes an assessment of the likely and actual harm done. The loss of exclusive enjoyment was thus concluded to be but a small price to pay for preventing the loss of a vessel (or even of human life), while any actual damage done could be met by the payment of appropriate compensation. *Miller v. Jackson*[97] can be explained in the same way. Since few cricket balls had ever actually been struck into the plaintiff's garden—and the few that had been struck there had caused little damage—there was little reason to constrain the players' liberty with an injunction; any damage could again be met by the payment of appropriate compensation if and when it occurred.

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[93] Broadcasting Act, 1990, c. 42, § 6, sched. 1.

[94] Ofcom Broadcasting Code, 2009, § 5.

[95] Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975) (holding that the burden of proving that material is not protected by the First Amendment is on the person seeking censorship). *See also* Madison Joint School Dist. v. Wis. Employment Relations Comm'n, 429 U.S. 167, 174-75 (1976) (holding that a school board could not prevent one of its teachers from voicing his concerns at a meeting open to the public). *But cf.* Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (holding that school is not required to permit student speech inconsistent with its educational mission even though government could not sensor similar speech outside of school).

Most importantly of all, the orthodox approach denies a government the ability to permit the torture of individuals, even in the name of national defense or emergency. There can be no question of requiring nuanced decision-making to balance competing interests since no-one has a legitimate interest in torturing others. A case recently heard by the European Court of Human Rights brings home the point.[98] In *Saadi v. Italy*,[99] the Court heard an application from a man whom the Italian authorities wished to deport to Tunisia, where a military court had already sentenced him, in his absence, to twenty years' imprisonment for membership of a terrorist organization operating abroad and for incitement to terrorism. He had also been deprived of his civil rights and made subject to administrative supervision for a period of five years. Reports from Amnesty International, Human Rights Watch and the U.S. State Department suggested that torture commonly occurred in Tunisian detention facilities.[100] The applicant argued before the Court that deportation would expose him to the risk of being tortured contrary to Article 3 of the European Convention on Human Rights.

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[96] 124 N.W. 221, 222 (Minn. 1910).

[97] [1977] EWCA (Civ) 6, *discussed in* STEVENS, *supra* note 14, at 105.

[98] App. No. 37201/06, Eur. Ct. H.R. (2008), *available at* http://www.meltingpot.org/IMG/pdf/ saadi.pdf.

[99] *Id.*

The United Kingdom Government submitted an *amicus* brief, which took precisely the line that Stevens's privilege argument suggests. The Court summarized the UK position as follows:

> [It] observed that in the *Chahal* case . . . the Court had stated the principle that in view of the absolute nature of the prohibition of treatment contrary to Article 3 of the Convention, the risk of such treatment could not be weighed against the reasons (including the protection of national security) put forward by the respondent State to justify expulsion. Yet because of its rigidity that principle had caused many difficulties for the Contracting States by preventing them in practice from enforcing expulsion measures.[101]

Effectively, the UK government sought a judicially-created privilege to override the individual right not to be tortured when the application of that right produced an undesirable result for a European government.[102] Quite rightly, the Court refused to adopt this argument. It noted that there was a risk that the applicant might be tortured if deported to Tunisia and held that there was no legal basis on which such risks could be weighed against other factors on a case-by-case basis.[103] It is hard to understand why any self-proclaimed "rights theorist" would take any other position.

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[100] *Id.* paras. 65-79, 82-93.

[101] *Id.* para. 117.

[102] *Id.* para. 122.

[103] *Id.* paras. 143-49.

E. A Question of Attribution[104]

This discussion of Stevens's treatment of the case law on qualified privilege and the tort of trespass exemplifies a broader problem, unfortunately emblematic of far too much tort theory over the last three decades. The difficulty has been identified by Jane Stapleton thus:

> [M]uch torts commentary in North America continues along the well-worn tracks of idealized theories. When those responsible for these intellectual constructs choose to address actual case law, they seek to rationalize it in a process akin to reverse engineering.[105]

As can now be seen, Stevens's book suggests that this tendency has now crossed the Atlantic. Perhaps his most sustained piece of "reverse engineering"[106] occurs in his treatment of the doctrine of vicarious liability. Here Stevens is evidently acutely aware that his "rights conception" must somehow withstand the challenge that, in Stapleton's view, always defeats such models because they cannot "accommodate within [them] a compelling explanation of the deeply entrenched uncontroversial phenomena of vicarious liability or the corporate veil."[107] This is because corrective justice and rights models are predicated on the basis that the wrongdoer must pay, whereas vicarious liability has entrenched the notion that a potentially innocent employer—in practice, usually the employer's insurance company—must pay.

Stevens's retort is to argue that vicarious liability is actually a misleading term because it confuses the issue of attribution. The current orthodoxy is that it is the *liability* for one person's tortious act that is attributed to another person. Stevens's view, however, is that it is the *act itself* which is attributed. In other words, he argues against the current orthodoxy of the "servant's theory" of vicarious liability and in favor of a resuscitation of what he claims to be the original "master's theory."[108] In other words, his interpretation of vicarious liability effectively treats employees working within the course of their employment as agents of their employer. Taking us back to cases from the seventeenth, eighteenth and mid-nineteenth centuries, he asserts that:

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[104] *Screen One: A Question of Attribution* (BBC television broadcast Oct. 20, 1991).

[105] Stapleton, *supra* note 3, at 266.

[106] *Id.*

[107] *Id.*

[108] STEVENS, *supra* note 14, at 260.

> The older cases speak of the imputation of acts, not liability. Although it has become more common for the courts to attempt to explain vicarious liability in terms of policy considerations, such concerns were not the historical origin of the rules.[109]

James Gordley has warned that we should be very slow to assert what judges in cases over a century ago really meant since it is so difficult to be sure.[110] But let us nevertheless assume that Stevens's bold assertions regarding the historical origins of the doctrine of vicarious liability are true. The difficulty remains that those origins do not control what the doctrine of vicarious liability means (or should mean) nowadays. Originalism makes no sense as a theory of interpretation of the law of torts since the latter is essentially the product of judges rather than of legislatures and was, in any event, not created in one fell swoop. (Of course, originalism cannot make any sense as a theory of interpretation in the United Kingdom, even in constitutional law, since the UK has no written constitution.) So any acceptance of Stevens's contentions regarding the origins of the doctrine of vicarious liability does not commit us to any particular view as to either what the doctrine means now or how it should be applied today. These are therefore matters for him to explain.

Stevens proceeds to make some general observations about the nature of attribution, pointing out that we allow the attribution of an act to a person even though s/he was not morally at fault.[111] Then he has to grapple with the case law. The first cases he considers are *Staveley Iron & Chem. Co. v. Jones*[112] and *Majrowski v. Guy's & St. Thomas' NHS Trust*.[113] It is not a promising start. As Stevens himself acknowledges, "that it is the act and not liability for the wrong which is imputed has been rejected in obiter statements of the House of Lords."[114] Stevens also points out that, since his theory of vicarious liability attributes an employee's act to the employer, "it can be argued that the attribution of the employee's act to the employer would lead to the ridiculous result that an employee who carelessly injured himself during the course of his employment could sue his employer."[115] This means that Stevens has to carve out an exception to his own general principle for just such an eventuality. A theory which cannot cope with such an everyday issue is problematic indeed.

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[109] *Id.*

[110] JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW 164-66 (2006).

[111] STEVENS, *supra* note 14, at 260-61.

[112] [1956] A.C. 627 (H.L.), *discussed in* STEVENS, *supra* note 14, at 261.

[113] [2006] UKHL 34, *discussed in* STEVENS, *supra* note 14, at 261.

Returning to the case law, Stevens claims that his theory supports the results achieved much better than current orthodoxy. However, over the next page of discussion, he cites only two cases, and they are both from the nineteenth century.[116] He also cites *Thompson v. Comm'r of Police for the Metropolis*[117] to show that the level of damages for which the employer is liable may be different from the measure of damages awarded against the employee.[118] But it is common ground that the issue of liability is different from determining the quantum of damages. Indeed, that is the whole basis of the law regarding both joint and several liability and comparative fault. So *Thompson* adds nothing to the argument in favor of a "rights conception."

In fact, Stevens cites only three cases decided since World War II which might be said to do that. As will now be explained, even this appearance is deceptive. The first such case is *Broom v. Morgan*, heard in the English Court of Appeal.[119] This raised the question of whether a defendant employer could be vicariously liable for injuries suffered by a woman as a result of her husband's negligence when both husband and wife were employees of the defendant. At the time, legislation meant that spouses were unable to sue each other. However, the Court of Appeal held that this immunity was not substantive but only procedural, so that it did not apply to the employer, who was accordingly held liable. *Broom* is clearly consistent with the master's theory rather than the servant's theory of vicarious liability. But *Broom* is over half a century old. While it was given some credence a couple of years later by the Australian case of *Tooth & Co. v. Tillyer*[120] (which Stevens does not cite), it has been clearly disavowed since then. The Supreme Court of Canada, for example, gave it short shrift in 1988 in *Angus v. Sun Alliance Ins.*[121] Giving the judgment of the Court in *Angus*, LaForest J said that the distinction drawn in *Broom* between a substantive and procedural immunity was "artificial."[122] He continued:

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[114] STEVENS, *supra* note 14, at 261 (citing *Staveley*, [1956] A.C. 627 at 643 *per* Lord Reid; *Majrowski*, [2006] U.K.H.L. 34 at para. 15 *per* Lord Nicholls, at para. 56 *per* Lord Hope of Craighead, at para. 68 *per* Baroness Hale of Richmond, at para. 81 *per* Lord Brown of Eaton-under-Heywood).

[115] *Id.*

[116] Chaplin v. Hawes, (1828) 172 Eng. Rep. 543; Mills. v. Armstrong (*The Bermina*), (1888) 13 A.C. 1 (H.L.) *discussed in* STEVENS, *supra* note 14, at 262 n.96.

[117] [1997] EWCA Civ. 3083, *available at* http://www.bailii.org/ew/cases/EWCA/Civ/1997/ 3083.html.

[118] STEVENS, *supra* note 14, at 265.

[119] Broom v. Morgan, [1953] 1 Q.B. 597, *discussed in* STEVENS, *supra* note 14, at 265.

> The provision in question provides a complete defence to an action. Whatever may be the reasons for this, and whether one agrees or disagrees with them, the provision of a complete defence to an action, just as much as the creation of a cause of action itself, is a substantive matter.[123]

On facts almost identical to *Broom* the employer was thus held not to be liable. Even if *Broom* once did represent the law, it seems as though it was an anachronistic hangover from a previous era, and one which has now been eradicated from the common law. Indeed, it is somewhat odd to be relying on a case that could be decided as it was because of an immunity which has since been abolished. It can only lend support to Stevens's contention as to the origins of the doctrine of vicarious liability, not as to what that doctrine means today.

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[120] (1956) 95 C.L.R. 605, para. 20 (Austr.), *available at* http://www.austlii.edu.au/au/cases/ cth/HCA/1956/ 49.html.

[121] Angus v. Sun Alliance Ins., [1988] 2 S.C.R. 256, para. 16 (Can.), *available at* http://csc.lexum. umontreal.ca/en/1988/1988scr2-256/1988scr2-256.pdf.

[122] *Id.*

[123] *Id.* at para. 20.

It is a similar story with another English case, *Twine v. Bean's Express Ltd.*[124] There a passenger sued a van driver's employer for damages for the injuries he had suffered as a result of the driver's negligence. The passenger was aware that employer had given the driver instructions not to give others a ride, thus making him a trespasser. At the time English common law took the view that an occupier did not owe a trespasser a duty of care. The Court of Appeal therefore refused to make the employer vicariously liable for the driver's negligence on the grounds that this would have the effect of making the occupier liable vicariously in circumstances where it would normally have had immunity. But again *Twine* is over fifty years old. A majority of the Court of Appeal declined to follow it twenty years later in the case of *Rose v. Plenty*.[125] Indeed, by that time the rule regarding premises liability towards a trespasser had itself been changed (and by the courts themselves, not by legislation).[126] Even before that, the decision in *Twine* had already been the object of sustained criticism, notably in Australia, where it was asserted that the employer owed the passenger a non-delegable duty.[127] As with *Broom*, *Twine* is useful for Stevens only to support his contention as to the origins of the doctrine of vicarious liability. It has nothing to offer so far as the current meaning and application of the doctrine is concerned.

The third and final potentially supportive case for Stevens is *Darling Island Stevedoring & Lighterage Co. v. Long*,[128] an Australian case where the negligence of an individual stevedore was held not to lead to the imposition of vicarious liability on his employer. Stevens claims that: "On the 'servant's tort' theory the result is inexplicable."[129] But this is simply an inversion of the truth. *Darling Island* is a case of breach of statutory duty, where the statute imposed the relevant legal obligation on the

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[124] [1946] 1 All Eng. Rep. 202, *discussed in* STEVENS, *supra* note 14, at 263.

[125] [1976] 1 W.L.R. 141, 141.

[126] British Rys. Bd. v. Herrington, [1972] A.C. 877 (H.L.), *available at* http://www.bailii.org/uk/ cases/UKHL/1972/1.html.

[127] *See, e.g.*, JOHN G. FLEMING, LAW OF TORTS 442 (3d ed. 1965); *Occupier's Liability*, c. 2, para. 35 (Law Reform Comm'n of New South Wales, Working Paper No. 3, 1969), *available at* http://www.lawlink.nsw.gov.au/ lrc.nsf/pages/wp3pt2.

[128] (1957) 97 C.L.R. 36, 69-70 (Austr.). *See* STEVENS, *supra* note 14, at 264.

[129] STEVENS, *supra* note 14, at 264.

"person in charge." Once the High Court had determined that this phrase was to be construed as referring to the individual actually supervising the operation rather than to the company for which he worked, then the result followed as night follows day; to have found otherwise would have defeated the stated purpose of the statute. Justice Fullager thus declared that:

> The position in this case is simply that the plaintiff sues for breach of a statutory duty, and, in order to succeed, he must find not merely a statutory duty but a statutory duty imposed on the defendant. If the defendant can be brought within the expression "person-in-charge" in reg. 31, the plaintiff can find such a duty. But, in my opinion, that expression cannot be construed as including the defendant company. And, in my opinion, that is the end of the matter.[130]

In other words, *Darling Island* is simply concerned with statutory construction. It tells us absolutely nothing about vicarious liability.

Stevens then tries to explain the very recent English case of *Majrowski v. Guy's & St Thomas's NHS Trust.*[131] There the House of Lords was required to rule on whether a health trust could be vicariously liable for the harassment, bullying and intimidation of one of its employees by one of its managers. The House held unanimously that it could. Giving the leading judgment, Lord Nicholls of Birkenhead stated plainly: "Vicarious liability is a common law principle of strict, no-fault liability."[132] Similarly, Baroness Hale of Richmond explained:

> Vicarious liability, as my noble and learned friend, Lord Nicholls of Birkenhead, has so clearly explained, does not depend upon the employer having done anything wrong or even having broken any legal duty imposed upon him. It merely requires that the enterprise pay for damage done by its employees in the course of their employment, a concept which now has a very broad meaning, and certainly embraces conduct which the

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[130] *Darling Island Stevedoring*, (1957) 97 C.L.R. at 56.

[131] *See* Majrowski v. Guy's & St. Thomas' NHS Trust, [2006] UKHL 34.

[132] *Id.* at para. 7.

> employer was actively trying to deter and could have done nothing more to prevent.[133]

It is thus very clear that their Lordships rejected entirely the agency or "master's tort" theory of vicarious liability. Indeed, Lord Nicholls made clear that, "[w]hatever its historical origin," the doctrine currently rests on the idea that "all forms of economic activity carry a risk of harm to others, and fairness requires that those responsible for such activities should be liable to persons suffering loss from wrongs committed in the conduct of the enterprise."[134]

It is therefore a bit rich for Stevens so infelicitously to declare that: "Although this approach fits with academic orthodoxy, it is wrong, although the result . . . is correct."[135] The point is surely that the result in *Majrowski* is correct *precisely because* it is entirely consistent with the standard explanation of the doctrine of vicarious liability. Indeed, the whole discussion of the case law on vicarious liability throughout the common law world clearly shows that, while the common law might previously have favored the master's tort (or agency) theory, it moved over to the servant's tort theory at least several decades ago. American common law has trodden precisely this path, neatly summarized by Judge Calabresi in *Taber v. Maine*:[136]

> The government understandably seeks to rely on an older conception of *respondeat superior*. This view of the doctrine required a close link between the 'agent' and 'profit' accruing to the master before vicarious liability attaches to the latter. . . . But today this position is in hasty retreat, if not rout . . . . As the leading Torts treatise has put it, 'the integrating principle' of *respondeat superior* is 'that the employer should be liable for those faults that may be fairly regarded as risks of [the] busi-

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[133] *Id.* at para. 68.

[134] *Id.* at para. 9.

[135] STEVENS, *supra* note 14, at 264.

[136] 67 F.3d 1029, 1036 (2d Cir. 1995).

> ness, whether they are committed in furthering it or not.'[137]

It is now clear that Stevens's approach not only has little normative appeal, it is also implausible as a description of the current state of tort law in any of the major common law jurisdictions. Stapleton's charge of "reverse engineering" could scarcely be more apposite.

III. THE FAILURE OF IDEALIST FUNDAMENTALISM

A. Ideal-Types, Not Immaculate Conceptions

From the foregoing discussion there seems little doubt that the only way to take Stevens's account of tort law seriously is as a purely theoretical construct. Writing at the end of the nineteenth and beginning of the twentieth centuries the German political philosopher, Max Weber, one of the founding fathers of sociology, developed a theoretical methodology whereby he attempted to isolate distinctive features of particular social practices (including law). He called these abstractions "ideal-types." They were ideal not in the sense that they were goals which would be worthwhile to achieve, but in the sense of sets of ideas that were not necessarily "exemplified in reality."[138] Weber himself put it this way:

> An ideal type is formed by the one-sided *accentuation* of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent *concrete individual* phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified *analytical* construct . . . .[139]

The usefulness of ideal-types is that they facilitate comparison. Thus:

> [They] were intended as methodological tools, providing clear, systematic benchmarks for understanding social processes.

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[137] *Id.* at 1036-37.

[138] DONALD G. MACRAE, WEBER 65 (1974).

[139] WEBER, *supra* note 18, at 90.

> They were not intended as normative models, nor as descriptions of historical phenomena. They should be assessed for their usefulness in illuminating trends and structures . . . .[140]

Weber himself employed two series of ideal-types in his analysis of law. One concerned three different and mutually exclusive forms of legitimate political authority—or "domination"—which he called traditional, charismatic and legal.[141] While Weber did not claim that political authority in any particular society in practice rests (or has rested) on only one form of domination, these ideal-types did enable him to make some telling comparisons about the different social orders apparent throughout history and in his own time. In particular, he showed that charismatic leadership was short-lived, and that economically-developed societies tended to coincide with legal domination. Additionally, he employed a four-fold classification scheme, based upon the degree of rationality and formality displayed, to analyze the different ways in which societies engage in lawmaking and law-finding.[142] This scheme again enabled him to demonstrate that the most economically advanced societies typically also had the most formal and most rational systems of adjudication—with one exception.

The problem for his model was that arguably the most advanced country of his day was the United Kingdom. Weber's analysis of English common law found however that, while it was a system of considerable formality, it was significantly lacking in rationality. The absence of codes for either civil or criminal law meant that the answer to many questions of law could not be known until after the event. Indeed, this very issue had prompted Jeremy Bentham, the founder of Utilitarianism, to deride the common law over half a century earlier:

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[140] Robert Reiner, *Classical Social Theory and Law*, *in* JURISPRUDENCE AND LEGAL THEORY: COMMENTARY AND MATERIALS 257 (James Penner, David Schiff, & Richard Nobles eds., 2002).

[141] MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 328 (A.M. Henderson and Talcott Parsons trans., 1964).

[142] MAX WEBER, ON LAW IN ECONOMY AND SOCIETY 63 (Edward A. Shils and Max Rheinstein trans., 1954).

> It is the judges (as we have seen) that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he *should not do*—they won't so much as allow of his being told: they lie by till he has done something which they say he should not *have done*, and then they hang him for it.[143]

Perhaps Weber's analysis was flawed; he himself attributed the UK's economic development to a Protestant work ethic.[144] Perhaps the UK was—and, without a written constitution, still is—simply unique, and so the rest of Weber's analysis remains valid. Or perhaps Weber just misunderstood the common law and the way that it had undoubtedly changed since Bentham's time. Whatever the best interpretation, what both Weber's critics and supporters have called the "England problem"[145] points up nicely one of the issues on which the success or otherwise of the employment of ideal-types depends. They must themselves be well-chosen so as to provide an insight into the most important alternative conceptions of the human practice under discussion. In this respect Stevens's choice of "loss conception" and "rights conception" fails on two counts. First, the conceptions are insufficient in number to capture all the main, alternative suppositions on which it could be argued that the law of torts is based. Secondly, they are insufficiently distinctive to facilitate meaningful comparisons between them. Yet by focusing on Stevens's preferred "rights conception" and, instead of comparing it with the "loss conception," it is instead treated as one possible ideal-type among several (as yet unspecified) others, then it may prove possible to derive some greater insight.

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[143] JEREMY BENTHAM, *Truth Versus Ashhurst*, *in* THE WORKS OF JEREMY BENTHAM VOL. V 233, 235 (London, Simpkin, Marshall, & Co. 1843).

[144] MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 11 (Talcott Parsons trans., 1992).

[145] *See, e.g.*, David Trubek, *Max Weber on Law and the Rise of Capitalism*, 3 WIS. L. REV. 720, 748 n.58 (1972); Martin Albrow, *Legal Positivism and Bourgeois Materialism: Max Weber's View of the Sociology of Law*, 2 J.L. & SOC'Y 14, 22 (1975); Sally Ewing, *Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law*, 21 LAW & SOC'Y. REV. 487, 487 (1987).

Ironically, what then becomes clear is precisely the opposite of what Stevens intends. Whatever the other possible conceptions might be, it is surely obvious that the law of torts over the last century or so has moved quite strongly *away* from anything resembling the "rights conception." Indeed, the cases cited by Stevens in support of his conception are overwhelmingly old, and many have subsequently been distinguished, doubted, ignored or overturned. Indeed, he constantly castigates courts for getting the law wrong since around the mid-1930s. In essence, Stevens is not so much arguing for a re-conceptualization of the law of torts as pleading that we should turn the clock back to supposed halcyon days when the judges articulated views in accordance with his own predilections. He is particularly keen to do away with the tort of negligence.[146] Even the very division of tort law theory into a "rights" and a "loss" conception turns out to have been taken from a debate held a century ago rather than one in which theorists are actively engaged today.[147] Weber, by contrast, did not believe that anything could be done to reverse the trends in social phenomena he identified. Even Karl Marx, with whose ghost it is often said that Weber was debating[148]—and who had argued that "philosophers have only *interpreted* the world, in various ways; the point is to *change* it"[149]—would never have thought of turning the clock *back*. While a strident critic of capitalism, he nevertheless thought it better than any previous socio-economic system.[150] Stevens is effectively taking on the role of tort law theory's very own King Canute.

B. The Flaw in Fundamentalist Idealism

Stevens himself paints an apocalyptic picture of what will happen not just to the law of torts but to our legal system more broadly if we do not turn back. It is, of course, in the nature of fundamentalism to believe that the world will disintegrate into anarchy (or worse) unless its own views and value-system are adopted. In this Stevens is simply echoing in torts the views of his near-namesake, Sir James Fitzjames Stephen. Writing over a century ago, Stephen believed that a refusal to apply the force of the criminal law to immoral behavior (even where no-one was harmed) would threaten the rule of law.[151] Stephen was wrong then; Stevens is wrong now. Indeed, it is hard to take seriously prophecies of impending doom when the prophet has just spent so much time saying that the factors which will produce legal Armageddon have been in place for the best part of a century.

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[146] STEVENS, *supra* note 14, at 296, 303.

[147] *Id.* at 301.

[148] *See, e.g.,* REINER, *supra* note 137, at 252.

[149] KARL MARX, *Concerning Feuerbach, in* EARLY WRITINGS 421, 423 (Rodney Livingstone & Gregory Benton trans., 1975).

[150] MICHAEL HARDT & ANTONOI NEGRI, EMPIRE 43 (2000).

But it is worthwhile to explore why the law of torts throughout the common law world has been moving away from the "rights conception." Stevens blames legal realism.[152] The problem with this is that it is what, in Weber's own time, would have been called an "idealist" explanation. "Idealism" in this sense again has nothing to do with the pursuit of ideals. Rather, it refers to a perspective which:

> [R]egards ideas as primary in legal causation. Accordingly, scholars and judges, as the developers of legal ideas, are the key to legal causation. In this view, social reality is important only in providing the material that the legal system will shape.[153]

In other words, Stevens apparently takes the view that the law has—wrongly, in his view—moved away from anything approaching the "rights conception" primarily because too many judges and legal academics have entertained muddled ideas as to what the law of torts is about. Yet it really is very difficult to believe that, at more or less the same time, much the same set of mistaken ideas simply "popped"—by chance or by choice—into the heads of so many senior judges and legal theorists throughout the common law world. It is hardly deniable that the law of torts on either side of the Atlantic, and in Australia, has demonstrated remarkable parallels. For example, the judgment which marked the birth of negligence law in the United Kingdom, delivered by Lord Atkin in *Donoghue v. Stevenson*,[154] was delivered within four years of Chief Judge Cardozo's judgment in *Palsgraf v. Long Island Railroad Co.*[155] in the United States. Although the facts of the two cases were very different—nausea and "nervous shock" brought on allegedly by seeing the remnants of a decomposing snail pour out of a half-drunk bottle of ginger beer are not self-evidently similar to being struck by a set of scales on a railroad platform as a result of guards' trying to push another passenger onto a moving train—Lord Atkin's "neighborhood principle" in *Donoghue* and Chief Judge Cardozo's "zone of danger" test in *Palsgraf* are actually remarkably analogous tests.[156]

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[151] JAMES FITZJAMES STEPHEN, *The Doctrine of Liberty in its Application to Morals*, *in* LIBERTY, EQUALITY, FRATERNITY AND THREE BRIEF ESSAYS 135, 151 (The Univ. Chi. Press 1991) (1873).

[152] STEVENS, *supra* note 14, at 306-14.

[153] Jay M. Feinman, *The Role of Ideas in Legal History*, 78 MICH. L. REV. 722, 729 (1980).

It is much more likely, surely, that these ideas were born of common experience. Changing technology and social circumstances experienced throughout the common law world have conditioned those living within such an environment to think much the same as their contemporaries (wherever they live) but differently from their predecessors. For example, the invention and use of, first, the railroad, and then the automobile has had arguably an even greater role in the development of tort law than did merchant shipping in the law of contracts. Latterly the same might be said of the advent of mass healthcare and the dispensing of powerful pharmaceuticals. More generally, two World Wars in which huge numbers of individuals made the ultimate sacrifice caused ordinary citizens to be less deferential to those in authority, while the public works programs that followed made them more expectant of certain social benefits. At the same time, mass communication and the increasingly rapid pace of technological development require a skilled, well-educated and relatively long-lived populace, both as workers and as consumers. It would be absurd to deny that all these events—and others—have had a significant impact on the thinking of people throughout the common law world (and indeed beyond). It seems inevitable that they must also have had a significant impact on the operation of the law of torts. Any prescription of what judges and scholars should be doing now must, therefore, take account of these factors.

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[154] [1932] A.C. 562 (H.L.), *available at* http://www.bailii.org/uk/cases/UKHL/1932/100.html.

[155] 162 N.E. 99, 105 (N.Y. 1928).

[156] *See* Weinrib, *supra* note 30, at 154-55.

IV. THE FAILURE OF ECONOMIC FUNDAMENTALISM

A. The Attraction of Economics

This is surely the real reason for the enduring attraction of the economic analysis of law. It is not simply that Richard Posner's economic interpretation of Judge Learned Hand's calculus[157] in *Carroll Towing*[158] provides a neat, albeit simplistic, manner of assessing the standard of care in negligence since, as Benjamin Zipursky has pointed out, *Carroll Towing* was "not itself a negligence case at all."[159] The real draw is that everyone feels that, somehow, the economy must have some impact on the law of torts. Thus jurisdictions which share a common law heritage and which have similar economic systems seem likely to have developed rules of tort law which are consonant with the operation of those very economies, thus making those rules similar too.

It is difficult to believe that lawyers had failed to notice this connection before Posner wrote about it, for Posner's basic insight was certainly not new, even in the 1970s. Representing either end of the spectrum of thought of what used to be called "political economy," Karl Marx, Friedrich Engels and Max Weber had made similar observations way back in the nineteenth century. Marx never really got around to a full discussion of what he called "the really difficult point [of] how relations of production develop unevenly as legal relations. Thus e.g. the relation of . . . private law . . . to modern production."[160] However, his friend, Friedrich Engels, explained more confidently that

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[157] Posner, *supra* note 23, at 32.

[158] United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

[159] Zipursky, *supra* note 4, at 1999-2000.

[160] KARL MARX, GRUNDRISSE 109 (Martin Nicolaus trans., Penguin Books 1973) (1939).

"law must not only correspond to the general economic condition and be its expression, but must also be an *internally coherent* expression which does not, owing to inner contradictions, reduce itself to nought."[161] Max Weber made a similar claim: "Obviously, any legal guarantee is directly at the service of economic interests to a very large extent. Even where this does not seem to be, or actually is not, the case, economic interests are among the strongest factors influencing the creation of law."[162]

The problem with the law-and-economics movement is that—like its idealist nemesis—it has taken this intuition beyond plausible bounds. Just as Robert Stevens wants to reduce the law of torts to a particular conception of rights, economically-inclined theorists seek to reduce tort law to a matter of economics. Ben Zipursky argues that:

> Posner asked whether negligence law really was a formless charade, whether the concept of negligence was merely an emotive shell covering incoherence. When it was written, *A Theory of Negligence* was intended to provide an emphatic "no" in answer to that question.[163]

The irony is that, in reducing issues in tort law to questions of economics, Posner actually portrays the law as engaged in a much broader charade. He allows such little autonomy to tort law that he is, ironically, guilty of propounding the same dogma of "economism" as was apparent in the early years of the Bolsheviks in the Soviet Union.[164] Law schools there were so preoccupied with the changes brought about by the new economic order that they introduced "a new discipline called 'Economic Law' [dominated by economics and only] to the very end of which were relegated a few lectures on civil law."[165] Some courses on torts in the United States seem to follow a not dissimilar pattern.

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[161] Friedrich Engels, *Letter to Conrad Schmidt*, October 27, 1890, *reprinted in* KARL MARX AND FRIEDRICH ENGELS, SELECTED CORRESPONDENCE 504 (1975).

[162] WEBER, *supra* note 142, at 37.

[163] Zipursky, *supra* note 4, at 2041.

[164] CHARLES BETTELHEIM, CLASS STRUGGLES IN THE USSR, FIRST PERIOD: 1917-1923, at 33 (Brian Pearce trans., 1976).

[165] John N. Hazard, *Foreword* to EVGENY PASHUKANIS, SELECTED WRITING ON MARXISM AND LAW xi (Piers Beirne & Robert Sharlet eds., 1980) (alteration to the original).

Indeed, it is difficult to avoid the nagging suspicion that, just as in the Soviet Union, the real motivation behind this approach is not so much to describe the current law as to *change* what happens so as to reflect a specific set of goals.[166] For the purposes of this article, the problem with any such normative theory is not that its objectives are open to question (although there is, of course, an enormous literature on this controversy).[167] Rather, the significance of any such normativity is that it necessarily implies that, just like Robert Stevens's "rights model," the law-and-economics approach has little to offer as a predictive or explanatory tool of *current* case law.

Consider, for example, the general rule that prohibits recovery by a plaintiff for "pure" economic loss sustained as a result of wrongful conduct by the defendant. It is exceedingly difficult to see why this is any more efficient than would be the case with a general rule which permitted such recovery. Nor is it clear why it suddenly becomes efficient for a plaintiff to be able to recover for economic loss whenever such loss is a consequence of physical injury or damage. In fact, the combination of these two rules regarding recovery for "pure" and "consequential" economic losses has the somewhat strange effect that the suffering of physical harm makes the defendant liable for both that harm and the economic loss; it is, yet again, rather hard to see what measure of efficiency can justify such a result. Indeed, in *Louisiana v. M/V Testbank* Judge Wisdom took the view that the current position taken by American tort law is actually contrary to the pursuit of economic efficiency. Dissenting from the court's decision to deny recovery for economic loss on the grounds of lack of accompanying physical harm, he argued:

> The advantages of this alternate rule of recovery [that would allow recovery for economic loss without the prerequisite of physical damage] are that it compensates damaged plaintiffs,

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[166] *See* Jack M. Balkin, *Too Good to be True: The Positive Economic Theory of Law*, 87 COLUM. LAW REV. 1447, 1477 (1987).

[167] Perhaps the most trenchant critique is Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980).

> imposes the cost of damages upon those who have caused the harm, *is consistent with economic principles of modern tort law*, and frees courts from the necessity of creating a piecemeal quilt of exceptions . . . .[168]

B. Economics Gone Wrong

It therefore seems that the law of torts often fails to promote an efficient allocation of resources. Perhaps the reason why the contrary assertion is repeated so often is that many legal theorists make poor economists. They advocate that the law should attempt to mimic the operation of the free market, whose "invisible hand" was eloquently lauded by Adam Smith in a famous passage in *The Wealth of Nations*:

> As every individual, therefore, endeavors as much he can both to employ his capital in the support of domestic industry, and so to direct that industry that its produce may be of the greatest value; every individual necessarily labors to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was not part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.[169]

Taking this as its starting-point, the law-and-economics movement then argues that, since this shows that the free market promotes the interests of society by allocating resources in the most efficient manner, the law of torts should do the same by deciding each case in the way that best promotes efficiency between the parties.[170] So when an incident occurs in which one person is harmed accidentally at the hands of another, the courts are supposed to look at which party could have avoided the loss more cheaply. If that was the defendant, and if the cost of the latter's taking precautions to avoid the plaintiff's being injured could be said to have been an efficient use of resources, then the defendant should be held liable.[171] If, however, the precautions would have involved disproportionate expenditure or if the plaintiff had been better placed to protect her own safety, then her case should be dismissed and she should bear her own loss.

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[168] State of Louisiana v. M/V Testbank, 752 F.2d 1019, 1051 (5th Cir. 1985) (*en banc*) (emphasis added).

[169] ADAM SMITH, WEALTH OF NATIONS 456 (Book IV, ch. 2, 1776).

But, as will now be explained, this argument involves a complete misunderstanding of Smith's analysis. It does, in fact, commit three basic errors. First, it fails to appreciate the first rule of sociology. Groups of individuals are not simply the aggregation of those individuals. As a result, although group behavior is of course connected in some way to the conduct of the members who comprise the group, the two are clearly distinct. Failing to recognize this is often known as committing the ecological fallacy.[172] Smith clearly avoided doing so. In the passage cited above, he noted that the "invisible hand" of the free market works because social interests are promoted as a result of individuals pursuing *not* those same goals but *their own* self-interest. Yet the economism of many modern tort law scholars involves taking the social goal of efficiency and requiring that it be applied to the conduct of the individual parties to each dispute. The purpose of so doing is said to be that it promotes optimal deterrence by encouraging individuals to act in the most efficient way, both now and in future. But that is precisely what Smith argues *against*! He explicitly says that when individuals act in a manner designed to promote the interests of society, they are much less effective in so doing than when they pursue their own, independent interests. So the law-and-economics movement has, in fact, turned Smith's analysis on its head.

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[170] ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 290 (3d ed. 2000).

[171] *Id.* at 291.

[172] W.S. Robinson., *Ecological Correlations and the Behavior of Individuals*, 15 AM. SOC. REV. 351, 357 (1950).

Secondly, tort law economism confuses individual intentions with outcomes. Whatever any particular individual tries to do, there is of course no guarantee that he or she will succeed. An individual's perception as to the best course of action will frequently turn out to be wrong: lack of omniscience is an integral part of the human condition. There is bound to be a significant gap between, on the one hand, an individual's subjective evaluation of the various situations in which s/he finds him- or herself at the time and, on the other, the objective evidence, provided with hindsight in a courtroom, as to what would have been that person's best course of action. This distinction between individual intentions and outcomes is implicit in Smith's analysis. In fact, it is this very distinction which enables him to avoid committing the ecological fallacy. In the passage above, for example, he does not simply move from a discussion of individuals to a comment on society. The most important point of what he is saying is that an aggregation of *individual intentions* produces an overall *social outcome.*

Economism again fails to recognize this. It focuses throughout only on outcomes and, in so doing, it overlooks the significance of Smith's point about individual intentions. Economism argues simplistically that, if the social outcome of efficiency is desired, then that tort law should—and does—create standards designed to promote efficiency in the dealings between each set of individuals who come before the courts. Smith is much subtler than this. His observation that a particular social outcome is the product of individual intentions means that each individual is both free to pursue whatever goals he or she chooses and to pursue them in whatever manner preferred (at least so long as neither end nor means is otherwise illegal). There is therefore neither justification nor necessity for imposing a goal of economic efficiency upon individuals who come before the courts. That would be to impute to them an intention to achieve society's goals—and that, as has already been remarked, is exactly the opposite of what Smith eulogizes.

Thirdly, the economism of tort law scholarship makes the analogous error of assuming that the social outcome of economic efficiency is the product of a social goal. Again Smith says no such thing. The very point of the metaphor of the "invisible hand" is that there is no overall objective, no collective intent or design. The outcome of social efficiency happens apparently by accident, but since it is an outcome that, by and large, we consider favorable, his point is that we should not interfere with it. This is quite different from saying that we should promote economic efficiency. Yet it is the latter which the economic fundamentalists of tort law actually advocate. It is somewhat ironic that the proponents of the law-and-economics movement—as advocates for the "possessive individualism" of the free market[173]—should apparently be so reliant on a model of human behavior which relegates each individual to the mere cipher of some collective objective! The free market does not impose any such objective; it is simply the place where a multitude of individuals interact with one another with the intention that such interactions will produce mutual benefits—but those benefits can be conceptualized in a wide variety of ways and are themselves contingent on a wide variety of perceptions and motivations.[174] The assumption that capitalism has an overall purpose—even if it might be a good purpose—is just bad economics.

As has already been seen, fundamentalist tort law theory (of whatever hue) has a strong tendency to re-engineer the law to fit a pre-determined pattern. It can now be seen that economic fundamentalism also involves the re-engineering of economic theory. Such re-engineering has led tort law's economic fundamentalists to making the basic mistake of confusing micro- and macro-economics. Even the Bolsheviks did not do that. Adam Smith's identification of the "invisible hand" of the free market was part of an argument that the best results are achieved when individuals do what they believe is best for them. Whatever the role of tort law might be, no free market economist could argue that they should have an external criterion imposed upon them as the basis for adjudicating upon any disputes. On the contrary, the law's role should be to facilitate individual choice and decision-making, and allow the parties to pursue whatever goals they choose so long as they do not otherwise break the law. In other words, the role of tort law is essentially to be complementary to the role of contract law.

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[173] C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: FROM HOBBES TO LOCKE 53 (1962).

[174] *See, e.g.*, Paul G. Mahoney & Chris William Sanchirico, *Competing Norms and Social Evolution: Is the Fittest Norm Efficient?*, 149 U. PA. L. REV. 2027, 2030 (2001); Paul G. Mahoney & Chris William Sanchirico, *Norms, Repeated Games, and the Role of Law*, 91 CAL. L. REV. 1281, 1288 (2003).

Oliver Wendell Holmes pointed out over a century ago that: "The object of our study then [of the law] is prediction. . . . "[175] This was of course part of his famous injunction to view the law from the perspective of the "bad man," which tends to paint the law as being focused primarily on criminal law. In fact, the good man (or good woman) and the neither-good-nor-bad-but-just-your average-Joe also need to have some confidence in their ability to predict outcomes. While it might seem perverse to say so, Adam Smith's analysis tells us that it does not matter whether that confidence turns out to be justified or not. What matters is that (whatever their motivation) individuals engage in economic activity, because that is what benefits society. So individuals must have sufficient confidence to make decisions and engage in such activity; if the law obscures the picture or causes confusion, individuals will lack the requisite confidence to engage in economic activity, and we all lose out. This arguably explains the point of punitive damages: since they may be awarded against a defendant who acted with intention to cause harm to others or was indifferent to whether he did so or not, it is useful that they cannot be easily estimated in advance. Such unpredictability is perhaps an even greater deterrent to such a potential tortfeasor than would be the case if he were able to predict the precise sum of punitive damages which would be awarded against him for his egregious behavior—even if that sum were very large.

C. Economism and Bad Law

Now that it has been established that the standard law-and-economics approach is based on bad economics, it will come as no surprise to learn that it produces a very strange account of the law. Again, it is possible to identify three basic errors. First, economic fundamentalism makes the assumption that the law needs to reflect what is best on economic grounds. It has already been seen that this assumption relies on faulty economics. But it is also faulty on legal grounds. The truth is that the law is often itself a factor in determining what is economically sound. The doctrine of vicarious liability provides an excellent example. If an employer knows that it can potentially be vicariously liable for the acts and omissions of its employees, but not for those of independent contractors, this will inevitably affect the calculation of what is the most economic way for that business to operate.[176] Of course, efficiency is not the only factor to be considered when determining how to organize a business. Convenience and the retention of a loyal workforce are but two of the many other factors which may be involved. Nor are questions of potential liability the only factors to be borne in mind when calculating efficiency: an ability to respond quickly to changes in the market, and an ability to exercise more hands-on control are among many other factors that would have an impact on an employer's calculation of what is likely to be most efficient.

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[175] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1896-97).

Yet it is undeniable that, in some cases, the line drawn by the law may have such a marked effect on what is most efficient that it becomes the major determinant of how the business is organized. Hospitals are excellent examples. Since a hospital in the United States can be held vicariously liable for the malpractice of its employees, but not usually for any malpractice of doctors who work as independent contractors on its premises,[177] many hospitals choose to engage a large number of their doctors on the latter basis.[178] Conversely, in England and Wales, it has been held that hospitals owe their patients a non-delegable duty of care, so that it is entirely irrelevant whether a doctor who has committed some act of malpractice is an employee or independent contractor.[179] Under those circumstances most hospitals prefer to employ their doctors as employees since (among other things) it gives them more control over each doctor's working practices. The difference in the legal environment in each case produces a change in the efficiency calculation and, in these cases at least, a difference in standard business practice. These are not instances of the economy shaping the law, but of the law shaping the economy. In such circumstances, it is not possible either to construct or to apply legal doctrine to create the most economically-advantageous result. It is only *after* the law or its application has been settled that it is possible to work out what the most economically beneficial way of behaving might be.

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[176] Jennifer Arlen & W. Bentley MacLeod, *Beyond Master-Servant: A Critique of Vicarious Liability*, *in* EXPLORING TORT LAW, *supra* note 3, at 111, 137-140.

[177] Hill v. St. Clare's Hosp., 490 N.E.2d 823, 827 (N.Y. 1986).

[178] Jennifer Arlen & W. Bentley MacLeod, *Malpractice Liability for Physicians and Managed Care Organizations*, 78 N.Y.U. L. REV. 1929, 1944 (2003).

[179] Cassidy v. Ministry of Health, [1951] 1 All E.R. 574 (C.A.).

Secondly, at the same time as they make this faulty assumption about the relationship between law and economics, the lovers of economism are also struck by the curse of fundamentalist blindness. This causes them to overlook an obvious truism. A court is nothing but a part of government. It is therefore somewhat self-contradictory for free-market advocates to argue that courts should impose a particular, substantive criterion for determining the outcome of cases. It is anathema to such theorists to have government dictate the appropriate standards of behavior, rather than having them determined by private individuals themselves. It should be no more appropriate to have the law impose economically-based criteria such as efficiency than it to have it impose criteria based on welfare or distributive justice. The idea of having the courts impose on the general population a criterion of reasonableness which reflects economic efficiency is thus as absurd as having economic fundamentalists tell professional basketball players that they are permitted to score points only by means of three-point shots since these require no more effort (and only a slightly increased risk of failure) for more gain than two-point shots. The true role of the law of torts is to provide a framework of rules within which individuals can decide for themselves what risks are worth running.

Unlike many instances of contract law, those which come under the rubric of the law of torts often occur in circumstances which give one (or perhaps both) sides in the subsequent dispute little chance to decide in advance how they would like the relevant risks to be distributed. This is where juries come in: as the representatives of the local community, they exist to provide a standard of reasonableness which reflects the values of that community. This acts as the best available surrogate for what the parties themselves would have chosen if they had had the opportunity to make a choice. But this very role of the jury highlights the third mistake made by economic theorists of tort law. Ironically, this is the same mistake as that made by Stevens in failing to recognize which questions are matters of law for the court and which are matters of fact for the jury.

If there were really just the one criterion of efficiency in determining what is reasonable in the law of torts, then this should surely be a question of law for the court.[180] In fact, of course, it is a matter of fact for the jury. This means that the jury may use whatever criterion of reasonableness that it collectively determines to be appropriate in the circumstances of the case. There is absolutely no warrant for asserting or assuming that the jury will latch onto economic efficiency as the appropriate criterion. Indeed, there is every reason to believe that, aside from cases of purely financial loss, this is the one criterion which they are extremely unlikely to use. Identification of economic efficiency implies some cold calculation. A jury is surely much more likely to make a more visceral judgment. Cold, intellectual calculation is the province of the judge. Yet questions of law for the court to determine in a torts case, such as whether a duty of care was owed under the tort of negligence, do not address the issue of economic efficiency at all.

Any theory which purports to explain the operation of the law of torts must clearly explain why the judge is given the responsibility for certain questions, while others are given to the jury. It must also explain how the judge determines the answer to the set of questions which are his or her responsibility, while also explaining why the jury is given such wide discretion in its own decision-making. Economic fundamentalism treats every issue in a torts dispute as part of a homogenous whole, and so is blind to each of these issues. Its re-engineering of the law of torts thus goes well beyond providing new explanations for individual cases just so that they fit the theory; economism's narrative account of the law of torts as a whole is essentially mystical.

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[180] Goldberg, *supra* note 9, at 555-56.

V. TOWARDS A THREE-DIMENSIONAL THEORY

A. Rejecting Fundamentalism

It is clear that neither Stevens's rights theory nor Posnerian economism can explain vicarious liability. Both types of reductivism fail miserably to explain why a plaintiff in a public nuisance claim needs to piggy-back on harm suffered by others who cannot themselves bring suit. Nor do they offer plausible accounts of developments regarding the law of actual and proximate causation, such as the idea that materially increasing the risk of harm may sometimes be substantively the same as causing loss,[181] or that loss of a chance of some potential benefit is as recognizable for the purposes of tort law as physical or economic loss.[182] Basic assumptions are also left wholly unexplained. Why, for example, does lying to a lover not amount to a tort when it seems to fit all the requirements (especially once loss of a chance is recognized) either of fraudulent misrepresentation or of the negligent infliction of emotional distress? Can it really be a matter of economic efficiency? And, if corrective justice has any meaning, why are we apparently under no obligation not to mislead those who rely so closely upon us? Robert Stevens says explicitly that there is a right not to be lied to,[183] yet he offers no explanation as to why we cannot sue deceitful lovers. Even explanations as to why tort liability is sometimes strict yet, on other occasions, requires proof of fault are generally very weak. Indeed, for that very reason some theorists have argued for strict liability across the board.[184] But such advocacy for change just emphasizes the inadequacy of reductivist theories as explanations for the law that we currently have.

Swapping an opaque problem for an opaque answer is hardly progress. But reductivist approaches are found wanting not only at the level of specific details. Such reductivism is completely at odds with the heterogeneity of the methods by which the law seeks to put into effect these supposed economic or idealist goals. To put this another way, why does the law of torts comprise so many different torts if it is really about the pursuit of just one objective? Surely, if the engine of tort law were just economics, or rights, or corrective justice, the law of torts would take just the one form that best served the appropriate master. Similarly, as Jane Stapleton has pointed out, because this form of tort "theory is typically culturally blind, it also fails to address the phenomenon throughout the common-law world that there are major differences in the ambit of tort entitlements."[185] So even if torts with similar names are recognized in the US, UK, Canada and Australia, for example, it is not at all clear that cases with identical facts will yield identical results. As has already been shown, the trends in the law of defamation on either side of the Atlantic seem to be moving in opposite directions. Indeed, the federal nature of the United States means that the issue of different application of apparently similar laws is regularly in evidence from state to state. Yet reductivist approaches barely even acknowledge this.

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[181] RESTATEMENT (SECOND) OF TORTS § 323 (1965); McGhee v. National Coal Board, [1972] 3 All E.R. 1008, *available at* http://www.bailii.org/uk/cases/UKHL/1972/7.html.

[182] Falcon v. Memorial Hosp., 462 N.W.2d 44, 52 (Mich. 1990).

[183] STEVENS, *supra* note 14, at 8.

[184] Notably, Calabresi, *supra* note 34, at 13.

These objections to economism and idealist reductivism are hardly new. Nor are they difficult to identify: experience demonstrates that novice students can point them out in class without much encouragement. The question therefore is why do so many intelligent scholars spend so much time on reductivist theories which have consistently proven inadequate to the task. The uncomfortable suspicion is that both economism and idealist reductivism have moved well beyond the level of theory. Each school of thought has now become so firmly entrenched that adherence to one or other has become a matter of faith. They have, in other words, become emblems of fundamentalist dogma. Scholarship must not allow itself to be shackled in this way.

It is time to revisit the basic assumption underlying fundamentalist tort law theory. Richard W. Wright was quoted earlier as saying that "a successful normative and descriptive theory of law should at least be able coherently to explain and justify the principal features of the existing law. Only a monistic foundational theory holds out any prospect of being able to do so."[186] By now, however, it should be apparent that this is actually the reverse of the truth. In fact, a monistic theory is the only type of theory which has *no* prospect of being able to explain and justify the existing law. As in many other areas of life, fundamentalism is poisoning legal scholarship.

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[185] Stapleton, *supra* note 3, at 266-67.

B. Compromise Theory

To everyone bar the fundamentalists, it is obvious that *both* economics and ideas of rights and justice have some role to play in explaining and justifying the current law of tort. Any successful theory of torts will need to take account of *both* these two factors—and perhaps of more besides. For example, while Stevens apparently believes that "the rights we have and their scope need to be determined without reference to insurance concerns,"[187] it is difficult to believe that the widespread availability of liability insurance has not had some influence on tort law, even if it is not necessarily either direct or overt. Max Weber himself was strongly against reductivist accounts of social practices. As noted above, he found that the rise of certain countries as major economic powers could not be attributed solely to the formal rationality of their respective legal systems, since the most powerful country of his time, the United Kingdom, utilized a common law system which was significantly less rational than the civil law system of Germany and other economically-powerful continental European countries. (Would-be tort reformers in the United States would do well to take note.) Weber argued that another factor was also at work, the Protestant work ethic.[188] In other words, he attempted to produce a theory of social change which acknowledged both economic factors and the influence of ideas. Of course, recognizing what tort law theory must do and being able to accomplish it are very different things, and bringing together the influences of the economy and of ideas of rights or justice is a very difficult task. As Edward White has said: "the relationship between dominant ideas or values and 'significant' events in the history of a profession is extraordinarily complex and difficult to characterize."[189] This is probably a major reason why so few have attempted to do so.

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[186] Wright, *supra* note 11, at 160.
[187] STEVENS, *supra* note 14, at 109.
[188] WEBER, *supra* note 144, at 11.

One person who did attempt the task was that epitome of reason, the late Gary Schwartz.[190] The problem, as he acknowledged, is that any theory which suggests that "tort law imposes or assigns liability for proper deterrence reasons—unless this result is not compatible with the criterion of corrective justice"[191] or its converse, whereby "corrective justice [is] the criterion guiding liability-rule choices, subject to the constraint that these choices be compatible with proper deterrence policy"[192] must, if it is to avoid a total impasse, essentially just collapse back into one or other theory. Mark Geistfeld's recent attempts to reconcile fairness and efficiency, for example, simply end up by conceiving fairness only in economic terms.[193] Schwartz also noted that any such compromise theories will struggle to explain such important aspects of tort law as causation, landowners' liability to trespassers and suits for wrongful death.[194] His explanation regarding vicarious liability was not altogether convincing either.[195] In the end, Schwartz concluded that "it may be difficult, then, to develop a mixed theory that can account for all of tort law. . . . "[196]

Schwartz was not, however, finished. He declared that: "A *partial* mixed theory . . . merits discussion."[197] He proposed that negligence law, at least, be seen "as a practice which, at stage one, seeks to deter negligence generally, yet which then, at stage two, acknowledges the incomplete success of its stage-one effort and accordingly recognizes the corrective justice rights of those who have been victimized by negligence."[198] Deterrence and corrective justice are thus transformed into complementary rather than competing goals. Promising as this may look at first sight, further examination reveals that even this partial theory must still collapse into one or other form of reductivism. To give one example, there is the question of which doctrine in the law of negligence provides the deterrence factor, and which provides the corrective justice element. Economism emphasizes standard of care (breach of duty) as the doctrine which establishes the appropriate standards of behavior. By contrast, idealist reductivism stresses duty of care as the mechanism which best promotes corrective justice or the protection of individual rights. So, according to Schwartz's tentative proposal, standard/breach might perform the deterrence function and duty the corrective function.

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[189] G. EDWARD WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 97 (1978).

[190] Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1802 (1997).

[191] *Id.* at 1824.

[192] *Id.* at 1825.

[193] Mark A. Geistfeld, *Efficiency and Fairness in Tort Law* 43 (N.Y.U. Law & Economics, Working Paper No. 48, 2006), *available at* http://lsr.nellco.org/nyu/lewp/papers/48.

[194] Schwartz, *supra* note 190, at 1825.

[195] *Id.* at 1825.

[196] *Id.* at 1826.

[197] *Id.* at 1826 (emphasis added).

[198] *Id.* at 1828.

However, duty is also essential to any appropriate understanding of deterrence. If proof of duty is required, any organization engaged in a risk assessment of its activities will inevitably evaluate not just the likelihood that each process may itself go wrong, but who would then be liable to be injured and able to bring a claim. So it seems that duty performs a dual function. Unless a duty is owed to everyone, this means that the deterrence function of standard of care is significantly undermined by the requirement of proof of duty. So long as any injuries suffered are sustained by those to whom no duty is owed, then any behavior is acceptable to the law of torts, even if it falls well below the standards apparently required by the doctrine of standard of care. Any organization that determines that only such injuries are likely—for example, a petro-chemicals company which can identify no-one with a sufficiently tangible interest in certain waters as to be able to bring suit in the event of an oil spillage[199]—is then subject to no deterrent effect whatsoever. The compromise theory thus turns out, once again, to be reducible to just one of its supposedly two constituent elements.

Schwartz's proposal fails ultimately because it is incapable of generating a theory of change. Trying to run two goals of tort law along the same level of abstraction means that the nearest to a theory of change that can be achieved is some sort of oscillation up and down the scale: a little more liability here, a little less liability there. As Stapleton again has pointed out:

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[199] *See* Louisiana v. M/V Testbank, 752 F.2d 1019, 1032 (5th Cir. 1985).

> [M]any . . . "pure" theories of law . . . fail[] to expound a convincing rationale of the core characteristic of the common law system, namely, the dynamic evolution of legal entitlements based as they are on shifts in what are perceived as acceptable forms of distributive justice: the redistributive nature of *Macpherson* is again a good example.[200]

Simply combining deterrence and corrective justice does not explain why the court in *Macpherson*—subsequently followed in England by the House of Lords in *Donoghue v. Stevenson*—decided effectively to reconceptualize both those notions. Thenceforth, a manufacturer owed a new duty to a consumer with whom it had no contract—a change in the nature of corrective justice—and could thus perceive a new deterrent. Re-conceiving of *Macpherson* and *Donoghue* in terms either of rights or of efficiency takes us no further since neither school of fundamentalism is able to explain why the rights of consumers should have been expanded, or why the imposition of this additional liability in tort is more efficient or just than reliance on liability in the law of contract alone. A compromise theory which is made up of two elements, neither of which have anything to offer in explaining arguably the two most prominent cases in the canon of the common law of torts, will inevitably prove to be a dead-end.

C. Three-Dimensional Tort Law Theory

This does not mean, however, that some overall theory of the law of torts is either unnecessary or impossible. So long as we believe that any body of law is more than just a series of unpredictable, *ad hoc* adjudications, it follows that it must have some element of system to it. System-building is at the heart of the legal enterprise. Without some form of system, decision-making would be both arbitrary and irrational. It is the job of theory to identify the themes underlying this system and which act as the glue holding it all together. But we are still searching for an appropriate theoretical model.

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[200] Stapleton, *supra* note 3, at 266.

A glimpse of what is required can be obtained if we reconsider the demise of meaningful legal scholarship in the early days of the Soviet Union. As mentioned already, the dominant legal theory among the Bolsheviks of the 1920s and 1930s was the dogma of economism. This essentially relegated the study of law to an offshoot of the discipline of economics. As bourgeois market relations were replaced by Soviet-style public ownership of the means of production, it was thought that law would wither on the vine. There was therefore relatively little point in studying it independently. As the late John Hazard remembered from his own days there at the time:

> [This] theory held that Soviet legislators and jurists were not creating a proletarian or socialist system of law, but were merely putting to their own use the bourgeois law that they had inherited. Thus, there was no new legal form in process of creation, but only a transformation by degrees of content to meet the needs of those engaged in creating Soviet public order during the limited period required for the state and its handmaiden, the law, to wither away with the achievement of a classless society.[201]

It became apparent relatively quickly, however, that this dogma was incompatible with what was actually happening in the Soviet Union. Rather than the role of law diminishing, it actually expanded substantially. A new theory was required, which allowed for the creation of a new *form* of law, namely Soviet law.

The same error is being repeated within modern tort theory. Fundamentalists on both sides focus almost exclusively on the *content* of the law. Since this proves repeatedly to be futile, non-fundamentalists become skeptical of the whole theoretical endeavor[202] to the extent that Stapleton has derided it as the "carrot puree of high theory."[203] The basic point hitherto missed by so many theorists is that, like any other body of law, tort laws take a particular *form* as well as a certain substantive content. This is not the same as saying that the law takes on one appearance to mask the fact that it is actually doing something else. This is where the legal realists went wrong. In pointing out the undoubted fact that formal rules do not tell the whole legal story, they threw the baby out with the bathwater and essentially dismissed rules as a smokescreen. But, in fact, the form of law does matter. Statutes of limitation and repose are clearly important, for example, yet they speak only to formality and not to the substance of a dispute. In tort law, more specifically, it is important to explain why different torts require proof of different elements; why some are fault-based and others are not; why some require proof of harm while others presume harm; and why distinctions are drawn between different types of harm, or between misfeasance and nonfeasance. Indeed, an explanation for the existence of a plethora of different torts is also required. Thus far, the tendency has been to look at these issues only as matters of differing substance. But the various doctrines described here tell us nothing about the quality of individuals' behavior or of what society demands of each of us. They are concerned only with the conceptual categories which the law employs—and, *pace* the realists, it really does employ—to transform an instance of social discord into a legal dispute.

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[201] Hazard, *supra* note 165, at xi-xii.

[202] *See, e.g.*, PETER CANE, THE ANATOMY OF TORT LAW 21 (1997).

By its very nature, reductivism sees legal disputes as essentially the same as social disputes except for the fact that they are played out in a legal arena (typically a courtroom). But this is simply not an accurate depiction of how a torts case works. Arguments for both plaintiff and defendant must be translated into legal form. This means not simply that a vocabulary unfamiliar to the lay person is employed, but that what might seem to that person to be perfectly normal reasoning or justification may be deemed inadmissible in a legal forum. So while individuals routinely rely on information passed on to them by intermediaries (whether through professional channels such as the news media, or just through gossip) hearsay evidence is normally excluded from a torts trial. A case which a particular individual wishes to bring against a state or federal government may be denied simply because of sovereign immunity, without any inquiry into the substantive merits of the case. A suit for personal injury against an employer may focus not on the conduct of the individual who caused the injury, but on the formal matter of whether that person was an employee acting in the course of employment by the defendant employer. These formal matters constrain and guide the law of torts just as much—and sometimes more than—substantive questions as to the efficiency of certain conduct or the implications for the notion of justice of the parties' relationship.

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[203] Stapleton, *supra* note 3, at 267. Why high theory is a puree of carrot rather than some other vegetable is a matter for conjecture. Perhaps it will enable us to see through the dark of tort law. Currently it might be likened more appropriately to pea soup.

It is vital, therefore, for any meaningful theory of torts to explain and justify both its content and its form. Reductivist theories are clearly unable to do so. That is why they fail. But the fact that form and content operate in different ways means that it is now possible to conceive of a manner in which arguments of corrective justice and of economics might fruitfully be combined. One metaphor for this combination could be a graph where the *x* axis represents form and the *y* axis represents content (or *vice versa* if preferred). The state of the tort laws in any given jurisdiction at any given time can then be envisaged as a point on the graph whose co-ordinates are set by a particular combination of form and content. This automatically overcomes the problem identified by Stapleton, whereby tort law theory fails to recognize differences in tort law across different jurisdictions. Indeed, since the number of possible combinations of form and content seem—at least on a graph—to be infinite, theories of tort law which explain both would tend to expect different jurisdictions to adopt different specific rules, even where many of the broad principles turn out to be very similar. Whatever theories turn out to be capable of explaining these combinations, it is clear that they cannot be reductivist.

It is important to emphasize that form is synonymous with neither corrective justice nor efficiency. Content too is not simply a reflection of economic or idealist factors. The metaphorical graph does not represent particular combinations of corrective justice and economics. That would involve lapsing back into what we have already seen to be untenably fundamentalist reductivism. On the contrary, there is constant interplay between form and content, which means that the law of torts develops a degree of autonomy from external, economic and idealist influences. Even if the economy were static and ideas of corrective justice were similarly immutable—which is the picture often painted by fundamentalist theorists—the law would still be in flux because it is continually required to provide internally coherent and consistent answers to a wide variety of novel situations. Past principles must be developed, new exceptions or defenses created, unworkable solutions abandoned. Whether an issue is, for example, seen as falling under the rubric of contract, torts or—as is becoming increasingly fashionable—unjust enrichment will often yield a different answer to an identical problem. Yet a movement away from torts towards unjust enrichment is perfectly capable of taking place without any need for external stimuli (whether economic or idealist in origin). The flaw in the metaphor of a graph is that any theory of torts which purports to explain both content and form actually requires a third dimension—that of time. Since it must explain not only how tort law responds to the differing external demands of economics and rights, but also how it responds to this constant internal interplay of form and content, this sort of theory is bound to be a theory of trends. To put this another way, any meaningful theory of tort law must explain how the form of the law mediates external influences so as to provide a body of rules and principles that is both identifiable and reasonably consistent.

An attempt to sketch what three-dimensional tort law theory might look like must wait for another day. Yet it can confidently be said that the fact that it does not decry change, but expects and embraces it, will inevitably require the reevaluation of two key, conventional assumptions in addition to those already discussed. First, the idea that appellate cases are decided regularly on grounds of "policy" will need to be subjected to more rigorous scrutiny. If these apparently policy-oriented decisions turn out, on further inspection, to be moving the law in a more-or-less consistent direction, then the label "policy" may well turn out to be no more than a sloppy short-hand for a theorist's own inability to explain a particular line of cases. In other words, what is currently dismissed as "policy" may actually be consistent—albeit hitherto unarticulated—legal principle. If the theory being offered is one of description rather then one of prescription, that surely points more strongly in the direction of a flawed theory rather than of a wrong turn taken by the courts. Corrective justice scholars such as Ernest Weinrib regularly chide the Supreme Court of Canada, for example, for resorting to policy arguments when deciding whether or not a duty of care exists in the tort of negligence,[204] but fail to see that the Court has actually produced a series of highly consistent decisions. Consistency implies some force at work—whether internal to the law or external (economic or idealist)—which it should be possible to articulate more clearly in a systematic theory than has been achieved hitherto. The fact that they follow a consistent *trend* rather than hold the law consistently at one fixed point seems to fox many scholars at present. But a theory that expects change should find such trends much easier to explain, and is therefore less likely to feel the need to dismiss large numbers of cases as being decided on "policy" grounds.

Secondly, the assumption that every doctrine of law needs to be explained by the same factor can happily be abandoned by three-dimensional tort theory. While there is no reason to suppose that economics only has an influence on the law's content, for example, there is equally no reason to think that it must have an influence on every tort law doctrine. Does economics really have an influence, for example, on the range of defenses available to someone sued for defamation? Similarly, there is no reason to think that corrective justice considerations must somehow have a part to play in shaping every tort law doctrine. Do they really influence whether the law recognizes emotional distress or loss of a chance as compensable forms of harm (as opposed to influencing what remedies the law might grant if they are so recognized)?

It is time to abandon the fervor with which too many scholars stick religiously to dogmatic theories which have been shown on many occasions to be inadequate to the task. Tort law is a complex and heterogeneous beast; it requires a model incorporating several causal factors in order to be able successfully to explain and justify it. Theory is not simply about conceptual elegance. It is about trying to make sense of the world around us. Fundamentalist theories are no help at all in enabling us either to recognize tort law as it currently stands or to predict the outcome of future cases in real courts. A three-dimensional model which takes notice not just of ideas of justice and of economics, but also of the interplay within the law itself of matters of internal form and external content, stands a much better chance of doing so. A theory which could actually be useful in practice would make a pleasant change. The challenge now therefore is to develop the three-dimensional model before fundamentalism leads us any further astray.

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[204] Weinrib, *supra* note 30, at 165.

WHY WE NEED A SUPERFUND FOR HEDGE FUNDS

Dale B. Thompson[*]

INTRODUCTION

For years, many people believed that financial markets behaved similar to the pin-makers in Adam Smith's *The Wealth of Nations*: traders who sought financial rewards for themselves also ended up providing economic benefits for the entire nation, as if guided by an "invisible hand."[1] However, the events of this past year have led people to drop this notion of the performance of financial markets as inherently efficient. Instead, now, many are making calls for new and more powerful regulation of financial markets. It is thought that this regulation is necessary to prevent (or at least greatly reduce) future financial calamities.

One financial sector that faces pointed calls for regulation is hedge funds. Hedge funds are primarily a mechanism used to pool a large quantity of funds for investment from individuals that can bear a significant amount of risk. Then, because they operate outside of most regulatory restrictions, hedge funds invest these funds in risky enterprises, including the development of new financial instruments.[2] In doing so, these funds seek returns that "beat the market." They have become very popular with assets somewhere between one and two trillion dollars.[3]

The reason for this focus on hedge funds is that, at present, they are relatively unregulated compared with almost all other financial sectors.[4,5] Antifraud statutes[6] apply to hedge funds, and some hedge funds are required to report some of their holdings quarterly.[7] However, the structure of a hedge fund is designed specifically to enable it to avoid registration requirements, along with restrictions on investment strategies that apply to other financial sectors. The principal justification for the lack of regulation of hedge funds was the restriction on participation in a hedge fund to those who had the financial resources to bear the high risk of its activities. It was thought that this restriction would be sufficient to protect the public.

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[1] Smith's invisible hand was the market price, which provided signals to both producers and consumers.

[2] New instruments themselves can involve significant risks, because of the lack of experience with them.

[3] *See* Louise Story, *Hedge Funds, Unhinged*, N.Y. TIMES, Jan. 18, 2009, at BU1.

Nonetheless, the events of the past year have shown that there can be significant negative effects on the entire economy that arise due to investment errors made by a hedge fund. As a result, there have been many proposals to regulate hedge funds much more tightly. These regulations could include the imposition of reserve requirements, significant disclosure, and restrictions on investment strategies.

This article suggests that this approach is not the correct one to protect the public from the effects of hedge funds. Instead, using comparisons with our experiences with environmental regulation, this article proposes that the appropriate instrument to address hedge funds is a "Superfund." With the Superfund, a tax would be collected from hedge funds, and the revenues from this tax would then be used to purchase distressed financial assets when market failures arise due to prob-

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[4] Recently, the major investment banks either went into bankruptcy, were acquired by commercial banks, or themselves became bank holding companies. Consequently, the other remaining relatively unregulated financial sectors are private equity and venture capital. *See* Brian G. Cartwright, Gen. Counsel, United States Securities and Exchange Commission, *Speech by SEC Staff: The Future of Securities Regulation* (Oct. 27, 2007), *available at* http://www.sec.gov/news/speech/2007/ spch102407bgc.htm.

[5] It should be noted that this article deals only with the risks generated by the hedge fund sector. Other financial sectors cause similar risks, but they also operate under some form of regulatory control. In the future, it might be possible to extend the Superfund structure proposed by this article for hedge funds to these other sectors.

[6] Fraudulent behavior related to the sale of any security, including those held by hedge funds, is prohibited by 15 U.S.C. § 78 (b) of the Securities Exchange Act of 1934 and 17 C.F.R. § 240.10b-5.

[7] Under 17 C.F.R. §240.13f-1, hedge funds with greater than $100 million in assets under management are required to submit quarterly reports of some of their holdings. However, no disclosure is required for securities that are not publicly traded. *See* http://www.sec.gov/divisions/investment/ 13ffaq.htm.

lems with liquidity and valuation. The magnitude of this tax would be determined by the amount of liquidity risk[8] posed by the portfolio choices of the hedge fund. Consequently, the imposition of this tax would provide incentives to reduce liquidity risks.

In addition to developing a technique for addressing the social costs of hedge funds, this article also posits an arguably new category of market failure: this market failure exists when market prices fail to provide adequate information about valuation of the underlying good. This market failure is related to other traditional market failures: the consequences of imperfect information and market power. However, discussion of imperfect information as a market failure examines the effects of transaction costs in obtaining information about the non-price characteristics of goods and services, while discussion of market power focuses on inefficient market quantities and corresponding prices.[9] In contrast, this article highlights the consequences of market prices that no longer provide information about valuation. As with other market failures, this particular failure presents an opportunity for governmental intervention to correct it. One possible mechanism for intervention is for the government to provide limited funding for a competitive market in distressed assets.[10]

By addressing both market failures caused by the activities of hedge funds, the Superfund suggested by this article offers a superior alternative to extending command-and-control regulation to the financial sector of hedge funds. In the rest of this article, we begin with a description of the characteristics of hedge funds and then examine the academic and policy literature addressing their regulation. After that, we describe the market failures that can result from the operation of hedge funds, including the new market failure concerning valuation problems.

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[8] Liquidity risk is a particular form of "systemic risk," which covers all forms of risks to the entire financial system. See *infra* Part IV. A. For more on systemic risk, see Steven L. Schwarcz, *Systemic Risk*, 97 GEO. L.J. 193, 248 (2008).

[9] *See* KARL E. CASE AND RAY C. FAIR, PRINCIPLES OF MICROECONOMICS (6th ed. 2002), at 258-59 and 263-64.

[10] This idea of a competitive market was first proposed by Lucian Bebchuk. *See* Lucian A. Bebchuk, *A Better Plan for Addressing the Financial Crisis*, 5 THE ECONOMISTS' VOICE (2008), *available at* http://www.bepress.com/ev/vol5/iss5/art6.

We then examine potential mechanisms for addressing these market failures, including command-and-control regulation and the Superfund for hedge funds. We conclude with an analysis of how the Superfund for hedge funds would operate, along with a discussion of the role of international coordination in developing an effective solution.

I. WHAT ARE HEDGE FUNDS, AND WHAT DO THEY DO?

As a consequence of their predominantly unregulated status, there has not been a formal, universally-accepted definition of a hedge fund.[11] In the *Goldstein v. S.E.C.* case, the D.C. Court of Appeals noted, "'Hedge funds' are notoriously difficult to define. The term appears nowhere in the federal securities laws, and even industry participants do not agree upon a single definition. The term is commonly used as a catch-all for 'any pooled investment vehicle that is privately organized, administered by professional investment managers, and not widely available to the public.'"[12] Meanwhile, a report to Congress describes a hedge fund as "a privately offered investment vehicle that pools the contributions of its investors in order to invest in a variety of asset classes."[13] Hedge funds typically collect two types of fees, a management fee (based on the value of assets managed) and a performance fee (based on the level of profits).[14]

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[11] Frank Partnoy and Randall Thomas, *Gap Filling, Hedge Funds, and Financial Innovation* (2006), 22, *available at* http://www.brookings.edu/ES/RESEARCH/projects/t5/2006tc_partnoy.pdf; also *in*, NEW FINANCIAL INSTRUMENTS AND INSTITUTIONS (Robert E. Litan and Yasuyuki Fuchita, eds. 2007).

[12] Goldstein v. SEC, 451 F.3d 873, 874-75 (D.C. Cir. 2006) (citation omitted).

[13] Secretary of the Treasury, Federal Reserve Board, Securities and Exchange Commission, and Commodity Futures Trading Commission, A REPORT TO CONGRESS IN ACCORDANCE WITH S 356(C) OF THE UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM ACT OF 2001 (USA PATRIOT ACT) (2002), *in* JERRY W. MARKHAM AND THOMAS LEE HAZEN, CORPORATE FINANCE, CASES AND MATERIALS (2nd ed. 2008), at 883.

[14] A typical fee structure would be one percent for the management fee, and twenty percent of profits for the performance fee. *See* Alexander Ineichen and Kurt Silberstein, *AIMA's Roadmap to Hedge Funds*, Nov. 2008, 29, http://www.aima.org/ download.cfm/docid/6133E854-63FF-46FC-95347B445AE4ECFC. While a twenty percent fee for profits seems high, there are certain benefits to this structure because this equity share provides a stronger incentive for hedge fund managers to take a long-term perspective, in contrast to the bonus structure utilized for traders at investment banks. This

These descriptions suggest certain characteristics of hedge funds. Hedge funds invest in certain asset classes including derivatives[15] and short-selling[16] of securities, investments that are not always available to other financial sectors such as mutual funds. In order to maintain their access to these assets, hedge funds must be designed in a way such that they do not come within the purview of the securities laws (other than the anti-fraud provisions). They do this by restricting the number of their investors and by restricting investors to those with high net-worth.[17]

As a result of their design and consequent exemption from securities registration and regulation, hedge funds can pursue a wider variety of investment strategies. These strategies can include "convertible arbitrage, distressed securities, equity hedge, . . . event driven, macro, . . . and relative value arbitrage."[18] Convertible arbitrage is where a fund tries to take advantage of what it believes to be a pricing error between a security convertible into common stock and the underlying security. Another strategy is where a fund invests in the securities of a company that is in distress. Equity hedge is where the fund matches long holdings of stock with a hedged portfolio of short sales of related stock or indexes. Event driven funds make predictions about the possibility of a major corporate event such as a merger or bankruptcy and, based on these predictions, acquire either long or short positions in the affected stock. Macro funds allocate in-

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fee structure can therefore lessen liquidity risks that might be generated by hedge funds.

[15] The value of a derivative depends upon an underlying primary security. Two commonly used derivatives are put and call options, which give the buyer of the option respectively the rights to sell and buy the underlying security at a given price during a specified time frame.

[16] A short sale is when a security is initially borrowed and immediately sold to generate cash, with the promise to deliver the exact same type of security to the original holder at a specified time. A short seller makes a profit when the price of the security declines between the original borrowing and the ultimate re-delivery. Under Regulation T, the Federal Reserve has a margin requirement of "150 percent of the current market value of the security" in a short sale. 12 C.F.R. § 220.12 (c)(1), 63 Fed. Reg. 2827 (Jan. 16, 1998).

[17] Investment Company Act of 1940, 15 U.S.C. § 80a-2(a)(51)(A).

[18] Hedge Fund Research, Inc., *HFRX Strategy Definitions*, *available at* https://www.hedgefundresearch.com (select "HFRX Indices" tab; then follow "HFRX Indices;" then follow "HFRX Index Descriptions.").

vestments based on predictions of foreign exchange rates and international stock markets. Relative value arbitrage funds "take offsetting long and short positions in similar or related securities when their values, which are mathematically or historically interrelated, are temporarily distorted."[19]

To take full advantage of these strategies, hedge funds use "leverage." Leverage magnifies the rate of return of an investment, so that when profits are made, higher returns result. However, when there are losses, leverage again magnifies the amount of those losses. For example, consider the purchase of a $10 stock when you borrow 90% of the purchase price ($9). If the stock increases in price by $1, then you have made a 100% profit on your $1 up-front investment, even though the stock price itself has only changed 10%. However, if the price falls by $1, you have lost your entire investment, even though the stock price has fallen by only 10%. This is the nature of leverage.

In addition to these strategies, hedge funds have been a significant player in the market for collateralized debt obligations (CDOs).[20] CDOs are a form of a derivative: a CDO is issued by a special purpose vehicle (SPV) – a separate corporate entity – where the SPV owns a portfolio of credit instruments such as mortgages as collateral. The payout to the holder of the CDO depends on its "tranche:"[21] some are more senior and bear lower risk and lower return, while others are more junior and bear more risk. CDOs have come under intense scrutiny during this financial crisis. The criticism lodged against CDOs is that their complexity – involving hundreds of different financial instruments – made them difficult to properly assess value and risk, and also that by seeming to pool assorted risks, they gave the false impression that these risks did not need to be scrutinized more carefully. It was thought that by combining a number of different financial instruments, the overall risk would be reduced. However, as the nation-wide decline in the housing market led to increased defaults on mortgages, CDOs that were supposed to have very low risks instead were discovered to have assets whose risks were strongly correlated. As a result, these instruments turned out to be much more risky than they initially appeared and were a primary cause of the fall of Bear Stearns, causing the collapse of two of its internal hedge funds in the summer of 2007.[22]

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[19] JOSEPH G. NICHOLAS, HEDGE FUND OF FUNDS INVESTING 43 (2004).

[20] For more on CDOs, *see* FRANK PARTNOY, INFECTIOUS GREED: HOW DECEIT AND RISK CORRUPTED THE FINANCIAL MARKETS (2003), at 385-92. [hereinafter, INFECTIOUS GREED].

[21] The term tranche, French for "slice," refers to a portion of a pooled debt obligation that is different from other portions according to maturity date, risk level, and other factors.

II. ARE HEDGE FUNDS BENEFICIAL?

While hedge funds have received a great deal of criticism recently, less has been said about their social benefits. As we consider what to do about hedge funds, it is helpful to consider some of these benefits. As noted above, hedge funds seek risky investment opportunities, frequently using and sometimes developing instruments that are unavailable for many other financial sectors. In doing so, hedge funds play critical roles as arbitrageurs and in reallocating risk.

For example, consider the hedge fund strategy of convertible arbitrage, in which a hedge fund attempts to take advantage of relative pricing differences between convertible securities and the underlying common stock. A company offering both common stock and a convertible security does so to increase its flexibility in obtaining financing. However, the market for this financing is not always efficient: due to a variety of reasons,[23] the price available on the market for the convertible security may not reflect the full value of the underlying common stock. Hedge funds that take advantage of this inefficiency directly add to the market for the convertible security. Consequently, by pursuing this strategy, a hedge fund increases the demand for the convertible security, thereby enabling the company to obtain a larger amount of financing by issuing its convertible security. Thus, hedge funds reduce inefficiency by participating in arbitrage.

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[22] Kate Kelly and Randall Smith, *Market Swoons As Bear Stearns Bolsters Finances*, WALL ST. J., Aug. 4, 2007, at A1.

[23] One reason is future risk.

Hedge funds also enable the reallocation of risk by their development and use of alternative financial instruments. For example, Frank Partnoy in *Infectious Greed* tells the story of how Bankers Trust developed an "ingenious" technique to allow Japanese insurance companies to invest in Japanese stocks.[24] Under Japanese regulatory rules, Japanese insurance companies were forbidden to invest in Japanese stocks, but they were allowed to loan money. Bankers Trust designed a triangular trade in which Canadian investors borrowed Japanese yen and, instead of paying interest as the price for the loan, paid an "option on the Nikkei 225 stock index."[25] An identical option on the Nikkei 225 was then bought from European investors, through Bankers Trust (who was also providing a hedge for the Canadian investors). In the end, "[e]ffectively, a Nikkei 225 gamble was being passed from European investors to Bankers Trust to Canadian banks to Japanese insurance companies."[26] Although in this instance, these Japanese insurance companies ended up losing substantial sums in the crash of the Nikkei index,[27] the ability to develop new techniques to reallocate risks can deliver significant benefits to businesses.[28]

Therefore, as we consider mechanisms to address the social costs of hedge funds, we should also remember the significant social benefits of hedge funds from arbitrage and reallocation of risk.

III. THE HISTORY OF HEDGE FUNDS AND PRIOR ANALYSIS ON THE REGULATION OF HEDGE FUNDS

The first hedge fund was founded by Alfred Winslow Jones in 1949.[29] It was extremely successful: "that hedge fund made gains of over 1000 percent in a ten-year period."[30] Organized to avoid registration requirements, Jones's company was relatively unknown until a 1966 article in *Fortune* by Carol Loomis, "The Jones Nobody Keeps Up With."[31] In this article, Loomis coined the term "hedge fund." This article "spurred others to mimic his success."[32]

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[24] INFECTIOUS GREED, *supra* note 20, at 40-41.

[25] *Id.* at 40.

[26] *Id.* at 41.

[27] *Id.*

[28] A similar example is offered about the development of an alternative security to get around prohibitions against investment by U.S. investors in Thailand. *See id.* at 69-70.

[29] MARKHAM & HAZEN, *supra* note 13, at 885.

[30] *Id.*

Other funds were then organized to avoid registration requirements under the Investment Company and Investment Advisers Acts. Hedge funds avoid regulation under the Investment Company Act of 1940 by utilizing two exemptions within the act. One exemption is for those funds that are "beneficially owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities."[33] Another exemption is based on limiting investors to "qualified purchasers" and "qualified clients."[34] Qualified purchasers have investments valued at $5 million or more, while qualified clients have net worth of at least $1.5 million or have $750,000 invested in that fund.[35] Meanwhile, hedge fund advisers can also escape the registration requirements of the Investment Advisers Act of 1940 by having "fewer than fifteen clients" and not presenting themselves "generally to the public as an investment adviser nor acts as" one for an investment company.[36]

To a great extent, hedge funds enjoyed significant successes until 1997 and 1998. In 1997, a number of Asian countries (in particular Thailand, Indonesia, and South Korea) underwent a financial crisis, causing collapse of Asian currencies and rapid declines in their stock market values. This crisis spread to Russia in 1998, leading to the collapse of Russian stock and bond markets, and the eventual decision by the Russian government to devalue the ruble and declare a moratorium on its bonds on August 17, 1998.[37]

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[31] Carol Loomis, *The Jones Nobody Keeps Up With*, FORTUNE, Apr. 1966, at 237.

[32] MARKHAM & HAZEN, *supra* note 13, at 885.

[33] 15 U.S.C. §80a-3(c)(1).

[34] Sean M. Donahue, Note, *Hedge Fund Regulation: The Amended Investment Advisers Act Does Not Protect Investors from the Problems Created by Hedge Funds*, 55 CLEV. ST. L. REV. 235, 238 (2007).

[35] *Id.*

[36] 15 U.S.C. § 80b-3(b)(3) (2006).

The volatility in financial markets caused by these crises led to significant losses by hedge funds. The most-publicized hedge fund to be harmed during these crises was the Long-Term Capital Management Fund (LTCM). LTCM had been founded in 1994 by John Meriwether, a former top trader at Salomon Brothers, and it included Nobel laureates Robert C. Merton and Myron Scholes as founding principals.[38] Despite its sterling reputation and extremely high returns in its initial years, the fund suffered tremendous losses of billions of dollars due to its highly leveraged positions in related securities.[39] Eventually, the Federal Reserve Bank of New York organized a rescue of the fund, with a consortium of creditors and banks injecting capital in exchange for ninety percent of the equity in LTCM. It should be noted that less than a year later, after the crisis had abated, the value of LTCM's positions improved significantly, leading to a profit for the consortium members.[40]

In the aftermath of LTCM, the President's Working Group on Financial Markets (PWG) issued a report on hedge funds in 1999.[41] The PWG had been established after the 1987 stock market crash, and it consists of the Secretary of the Treasury, the Chairmen of the Federal Reserve, Securities and Exchange Commission, and the Commodities Future Trading Commission. The PWG recommended increasing disclosures about transactions by and with "significantly leveraged institutions, including hedge funds."[42] However, this report did not recommend requiring the registration of hedge funds.

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[37] *See* Abbigail J. Chiodo and Michael T. Owyang, *A Case Study of a Currency Crisis: The Russian Default of 1998*, 84 FED. RESERVE BANK OF ST. LOUIS REV. 7 (2002), *available at* http://research.stlouisfed.org/publications/review/02/11/ChiodoOwyang.pdf.

[38] *See* Long Term Capital Holdings v. United States of America (D. Conn. Aug. 27, 2004), at 5, *available at* http://www.usdoj.gov/tax/082704JBALongTermUS.pdf.

[39] *See* Lakonia Management Ltd. v. Meriwether, 106 F. Supp. 2d 540, 547 (S.D.N.Y. 2000); and ROGER LOWENSTEIN, WHEN GENIUS FAILED: THE RISE AND FALL OF LONG-TERM CAPITAL MANAGEMENT (2000).

[40] *Lakonia Management Ltd.*, 106 F. Supp. 2d at 548-49.

[41] PRESIDENT'S WORKING GROUP ON FINANCIAL MARKETS, HEDGE FUNDS, LEVERAGE, AND THE LESSONS OF LONG-TERM CAPITAL MANAGEMENT (1999), *available at* http://www.treas.gov/press/releases/reports/hedgfund.pdf.

[42] *Id.* at viii.

Nonetheless, in 2004, the Securities and Exchange Commission (SEC) promulgated a rule that essentially required hedge funds to register as investment advisers.[43] This decision was adopted by "a rare 3-2 margin, with an extensive dissent."[44] A number of lawsuits were filed to challenge the implementation of this rule. In one of these suits, *Goldstein v. S.E.C.*, the D.C. Circuit Court of Appeals vacated this rule, holding that its reclassification of "client" to include any "investor" was "arbitrary," and therefore not reasonable.[45]

Until the current financial crisis, the literature on the regulation of hedge funds was focused on the two events of the collapse of LTCM, and the SEC's registration rule along with its undoing in *Goldstein.* In the aftermath of LTCM, Willa Gibson recommends a limited amount of command-and-control regulation of hedge funds.[46] What is needed is "public regulation requiring hedge funds to disclose comprehensive information about their trading positions to financial regulators."[47] Despite this, Gibson also concludes that command-and-control rules restricting leverage by hedge funds, such as "capital and margin requirements,"[48] would be "inefficient and unnecessary."[49] Instead she suggests, "[p]rivate regulation achieved through the exercise of market discipline, both by hedge funds and by those with whom they trade, can provide a more effective means of constraining the use of leverage."[50]

In two reports,[51] Randall Dodd first identifies "specific features about financial markets . . . that violate the fundamental assumptions . . . of the efficient market theory."[52] These features include externalities, public goods, and informational problems. Because of these, "financial markets and the overall economy can be made more efficient by the imposition of certain government regulations."[53] Dodd argues in the second report that a number of new regulations should be imposed, including "reporting and registration requirements," "capital requirements and collateral requirements," and "Orderly Market Rules."[54]

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[43] *Registration Under the Advisers Act of Certain Hedge Fund Advisers, Investment Advisers Act Release No. IA-2333, 84 SEC Docket 1032* (Dec. 2, 2004). For more on this decision, *see* Troy A. Paredes, *On the Decision to Regulate Hedge Funds: The SEC's Regulatory Philosophy, Style, and Mission*, 2006 U. ILL. L. REV. 975 (2006) (recommending the use of a "default rule" rather than a "mandatory rule" for decisions like this).

[44] J.W. Verret, *Dr. Jones and the Raiders of Lost Capital: Hedge Fund Regulation, Part II, a Self-Regulation Proposal*, 32 DEL. J. CORP. L. 799, 808 (2007).

[45] Goldstein v. SEC, 451 F.3d 873, 884 (D.C. Cir. 2006).

[46] Willa E. Gibson, *Is Hedge Fund Regulation Necessary?* 73 TEMP. L. REV. 681 (2000).

[47] *Id.* at 682.

[48] *Id.* at 706.

[49] *Id.*

[50] *Id.* at 706.

[51] Randall Dodd, *The Economic Rationale for Financial Market Regulation*, FINANCIAL POLICY FORUM SPECIAL POLICY REPORT 12 (2002), *available at*

After the *Goldstein* case, a number of articles appeared suggesting that public regulation of hedge funds, even of the limited type recommended by Gibson, would be the incorrect approach. Although advocating some additional indirect controls on the amount of leverage available to hedge funds, Dale Oesterle argues that "extensive direct regulation of hedge funds is unnecessary and may harm the country's trading markets."[55] Carl J. Nelson likewise "argues that further hedge fund regulation is unnecessary and could actually negatively affect markets."[56] As a result, "increased hedge fund regulation should not be implemented because the potential benefits do not outweigh the costs."[57] Instead, Nelson offers alternatives that "address regulators' concerns over providing investor protection and market stability, while allowing hedge funds to operate freely."[58] In a similar manner, J.W. Verret concludes, "caught up in the regulatory zeal, the SEC and banking regulators will burden the nimble traders of the hedge fund world with regulation akin to the mutual fund industry and seek to limit access for institutional investors like trusts and pension funds to this useful as-

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http://www.financialpolicy.org/fpfspr12.pdf; and Randall Dodd, *The Virtues of Prudential Regulation in Financial Markets*, FINANCIAL POLICY FORUM SPECIAL POLICY REPORT 11 (2005), *available at* http://www.financialpolicy.org/fpfspr11.pdf.

[52] Dodd, *Economic Rationale*, *supra* note 51 at 1, 3.

[53] *Id.* at 3.

[54] Dodd, *Virtues of Prudential Regulation*, *supra* note 51 at 1-2.

[55] Dale A. Oesterle, *Regulating Hedge Funds*, 1 ENTREPREN. BUS. L.J. 1, 2 (2006).

[56] Carl J. Nelson, Note, *Hedge Fund Regulation: A Proposal to Maintain Hedge Funds' Effectiveness Without SEC Regulation*, 2 BROOK. J. CORP FIN. & COM. L. 221, 222 (2007).

[57] *Id.*

[58] *Id.*

set class."[59] Verret instead recommends a private regulatory scheme by the hedge funds themselves.

Until the current financial crisis, policymakers were likewise hesitant to regulate hedge funds. During his nomination hearings in 2004, Alan Greenspan proclaimed, "I see no purpose in regulation [of hedge funds], and I see very significant potential loss in doing so."[60] He explained: "[i]f you start to inhibit the number of types of unregulated participants in the financial market from taking the types of risks and supplying the liquidity, I am fearful that we will remove some of the flexibility that we have in our overall system."[61]

As recently as February 2007, the President's Working Group on Financial Markets echoed Gibson in preferring market discipline over command-and-control regulation. In 2007, the PWG examined the need for regulation of hedge funds and concluded, "[m]arket discipline by creditors, counterparties, and investors is the most effective mechanism for limiting systemic risk from private pools of capital."[62]

Nonetheless, the current financial crisis has now led academics and policymakers to recommend additional regulation of hedge funds. In a recent article addressing systemic risk across the financial system, Steven Schwarcz concludes that "regulatory measures are appropriate . . . because, like a tragedy of the commons, market participants have insufficient incentives, absent regulation, to limit risk-taking in order to reduce the systemic danger to others."[63] Included in his recommendations is a "liquidity provider of last resort" (LPOLR),[64] which is somewhat similar to the part of this article's Superfund, the part that purchases "toxic" securities.[65] However, the scope of Schwarcz's

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[59] Verret, *supra* note 44, at 841.

[60] Nomination of Alan Greenspan, Hearing Before the Committee on Banking, Housing, and Urban Affairs, United States Senate, One Hundred Eighth Congress (2004), *available at* http://www.access.gpo.gov/congress/senate/senate05sh108.html.

[61] *Id.*

[62] PRESIDENT'S WORKING GROUP ON FINANCIAL MARKETS, AGREEMENT AMONG PWG AND U.S. AGENCY PRINCIPALS ON PRINCIPLES AND GUIDELINES REGARDING PRIVATE POOLS OF CAPITAL (2007), at 3, *available at* http://www.treasury.gov/ press/releases/ reports/hp272_principles.pdf.

[63] Schwarcz, *supra* note 8, at 248.

[64] *Id.* at 225.

[65] *See infra*, Part VI.C.

LPOLR would be much broader than this article's Superfund. The LPOLR would address systemic risk across all financial sectors, while the Superfund would address the market failures of liquidity risk and valuation caused solely by hedge funds.

In 2008, the United States Treasury published its "Blueprint for a Modernized Financial Regulatory Structure."[66] In its Blueprint, the Treasury recommended a new structure for the regulation of all financial institutions. Included in this structure would be the requirement for all financial institutions to be federally chartered, with hedge funds required to obtain a charter as a federal financial services provider (FFSP). To obtain this charter, hedge funds would be required to meet "appropriate national standards, in terms of financial capacity, expertise, and other requirements. . . . For example, these standards would resemble the net capital requirements for broker-dealers."[67] Also, the Blueprint assigned the role of "Market Stability Regulator" to the Federal Reserve. In this role, "the Federal Reserve should also have the authority to develop information-reporting requirements for FFSPs . . . includ[ing] detailed reports on overall risk management practices."[68]

Around the same time as the Treasury Blueprint, another proposal was made by the Financial Stability Forum (FSF).[69] This proposal was in response to a request by the "G7 Ministers and Central Bank Governors . . . to undertake an analysis of the causes and weaknesses that have produced the turmoil and to set out recommendations for increasing the resilience of markets and institutions."[70] In its proposal, the FSF made a number of recommendations that involved regulation of hedge funds and other financial institutions. One recommendation involved the imposition of "requirements for certain complex structured credit products such as CDOs of asset-based securities."[71] Others involved the use of rules for the "management of firm-wide risks" including "stress testing guidance for risk management and capital planning purposes,"[72] and rules for "enhancing transparency and valuation."[73]

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[66] U.S. DEPARTMENT OF THE TREASURY, BLUEPRINT FOR A MODERNIZED FINANCIAL REGULATORY STRUCTURE (2008), *available at* http://www.ustreas.gov/press/releases/reports/Blue print.pdf.

[67] *Id.* at 19.

[68] *Id.* at 16. A similar recommendation of apportioning oversight roles based on objectives is derived from an analysis of the social and network effects of investment trading. *See* Olufunmilayo Arewa, *Trading Places: Securities Regulation, Market Crisis, and Network Risk* (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1324951.

[69] FINANCIAL STABILITY FORUM, REPORT OF THE FINANCIAL STABILITY FORUM ON ENHANCING MARKET AND INSTITUTIONAL RESILIENCE (2008), *available at* http://www.fsforum.org/publications/ r_0804.pdf.

[70] *Id.* at 1.

Recently, the United States Congress has also explored the possibility of regulating hedge funds. In one hearing, a House of Representatives committee heard the testimony of five prominent hedge fund managers: Philip A. Falcone, Kenneth C. Griffin, John A. Paulson, James Simons, and George Soros. These leaders "said they would support new rules that would require their industry, controlling nearly $2 trillion, to disclose more of its secrets. . . . [T]he hedge fund industry's leaders seem to realize that regulation may be inevitable."[74] In January 2009, Senators Carl Levin and Charles Grassley introduced the Hedge Fund Transparency Act to "impose government oversight of hedge funds."[75] Under this bill, hedge funds would be required to register with the SEC, and would also require disclosure of assets.[76] This legislation was preceded by the issuance of a report advocating more intensive regulation of hedge funds by the Group of Thirty, headed by Paul Volcker, former Chairman of the Federal Reserve and current advisor to the Obama administration.[77] Moreover, in February 2009, state legislators in Connecticut likewise introduced three pieces of legislation to enable state regulation of hedge funds.[78]

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[71] *Id.* at 13.

[72] *Id.* at 18.

[73] *Id.* at 22.

[74] Louise Story, *Hedge Fund Managers Ask for a Few New Rules*, N.Y. TIMES, Nov. 14, 2008, at B6.

[75] Stephen Labaton, *Senators Bid To Regulate Hedge Funds*, N.Y. TIMES, Jan. 30, 2009 at B1. This bill also covers private equity firms.

[76] Jenny Strasburg, *Legislators Seek Hedge-Fund Disclosure*, WALL ST. J., Feb. 2, 2009, at C2.

[77] GROUP OF THIRTY, FINANCIAL REFORM: A FRAMEWORK FOR FINANCIAL STABILITY (2009), *available at* http://www.group30.org/pubs/pub_1460.htm.

[78] Greg Bordonaro, *Lawmakers Propose Stiff Hedge Fund Oversight*, HARTFORD BUS. J., Feb. 23, 2009, *available at* http://www.hartfordbusiness.com/news8031.html.

Meanwhile, there have been many proposals to put a tax on financial services transactions. In 1978, James Tobin proposed a one percent tax on currency transactions in the spot market, in order to reduce short-term currency speculation.[79] In 1989, Joseph Stiglitz proposed a 0.25% tax on all financial services transactions, likewise to reduce short-term speculation.[80] Recently, Dean Baker has advocated a tax on all financial transactions that varies according to the type of transaction.[81]

My research then is an attempt to present an alternative structure to dealing with the problems presented by hedge funds, rather than imposing restrictive command-and-control regulation. My article proposes using a tax on hedge funds, but it differs significantly from these previous recommendations to tax financial transactions.

One difference is its more limited scope: it would apply only to hedge funds and not to other financial institutions that operate under more extensive command-and-control regulation such as mutual funds and investment banks. More importantly, these other tax proposals levy either a flat tax for all financial transactions or a tax that is differentiated only by type of security (equity, bond, future, option, interest rate swap). In contrast, under my proposal, the level of the tax is adjusted depending on the effect of the hedge fund's transaction on liquidity risk. While flat taxes reduce the activity level of these transactions, only calibrated taxes provide direct disincentives to reduce specifically risky transactions.

IV. THE SOCIAL COSTS OF HEDGE FUNDS

While hedge funds do provide many social benefits, they also can bring significant social costs. Two of the most significant are liquidity risks, which can be considered as an externality, and the inability of markets to provide information on valuation.

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[79] James Tobin, *A Proposal for International Monetary Reform*, 4 E. ECON. J. 153 (1978), *cited in* Robert Polin, Dean Baker & Mark Schaberg, *Securities Transaction Taxes for U.S. Financial Market*, 20 POL. ECON. RES. INST. WORKING PAPER SERIES 2 (rev. 2002).

[80] Joseph E. Stiglitz, *Using Tax Policy to Curb Speculative Short-Term Trading*, 3 J. FIN. SERVICES RES. 101 (1989).

[81] *See* Dean Baker, *The Benefits of a Financial Transactions Tax* (2008), *available at* http://www.cepr.net/documents/publications/financial-transactions-tax-2008-12.pdf. Baker's proposal is a fee structure that applies not only to equity trades, but also to bonds, futures, options, and interest rate swaps.

A. Liquidity Risks

We begin with a discussion about liquidity in general, followed by an analysis of hedge funds effects on liquidity. Liquidity is the ability to convert certain assets into other assets without suffering any loss in value. Universally accepted money—"cash"—is the most liquid asset, because it can be used to acquire other assets without losses in value. Some might think that liquidity (money) does not affect the real economy because the real economy results from real inputs (labor, capital, land, technology) generating real outputs (goods and services). However, liquidity does have significant effects on the real economy.

This can be understood by considering the indirect production function. The direct production function states that output (Y) is generated by combining inputs (X), a vector of different inputs) according to the functional relationship, $Y = F(X)$. However, in an economy, the production function operates under the following constraint: you must be able to afford your inputs. Therefore, the full direct production function is actually:

> $Y = F(X)$, subject to $C = W'X$ (where C is your available cash, and W represents the vector of input prices).

We can rearrange this to solve for the indirect production function:

$$Y = \Psi(W,C).$$

This indirect production function makes it clear that liquidity (C, cash) has a direct effect on the ability of the economy to generate real output (Y).

This effect seen through the indirect utility function can also be understood intuitively. In business operations, input costs are generally incurred prior to the generation of revenues. As a result, in order to operate production, the firm must obtain short-term financing to pay for inputs prior to the realization of the revenues. Consequently, when credit is tight (i.e. there is a reduction in liquidity), it is difficult to finance operations and less output is generated.

Because liquidity has effects on the real economy, reductions in liquidity can have detrimental effects. Indeed, reductions in liquidity – liquidity risks – can be considered as an externality, just like pollution.[82] An externality is generated when the actions of two trading partners have consequences for a third party. A factory may be building a table for purchase by a consumer who lives in another state. However, in constructing the table, the factory also generates pollution that causes negative consequences for neighboring residents. These negative consequences are known as a negative externality, because these residents are not part of the transaction between the factory and the consumer. These externalities are an example of a market failure.[83]

We use a variety of mechanisms for correcting the market failure resulting from pollution: command-and-control regulation, along with economic-incentive-based instruments such as tradable permit systems[84] and tax systems.[85] Under command-and-control regulation, a government agency prescribes pollution abatement standards for a particular industry that must be complied with by each firm in order to obtain its permit. These requirements may be stated in technological terms, i.e., each firm must use specific pollution reduction equipment. They may also be stated in terms of a maximum quantity of pollution emitted. However, to determine this maximum quantity, the agency bases this quantity on the amount emitted when specific pollution reduction equipment is used.[86] So, in essence, all command-and-control regulatory systems for pollution reduction are based on rules specifying the use of particular pollution-reduction technology.

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[82] Just as with liquidity, models of the production function sometimes include pollution as an input. *See* Maureen L. Cropper & Wallace E. Oates, *Environmental Economics: A Survey*, 30 J. ECON. LIT. 675 (1992); Don Fullerton & Gilbert E. Metcalf, *Environmental Controls, Scarcity Rents, and Pre-Existing Distortions*, 80 J. PUB. ECON. 249 (2001).

[83] Economists generally identify the principal market failures as externalities, public goods, moral hazard, imperfect information, and firms with market power such as monopolies. *See* CASE & FAIR, *supra* note 9, at 255-59, 335.

[84] One such example of a pollution trading system is the RECLAIM emissions market for southern California. *See* Dale B. Thompson, *Political Obstacles to the Implementation of Emissions Markets: Lessons from RECLAIM*, 40 NAT. RESOURCES J. 645 (2000).

[85] The use of a tax for correcting market failures was first suggested by ARTHUR C. PIGOU, THE ECONOMICS OF WELFARE (1920).

Economic-incentive-based instruments are designed to address the overproduction of the good that generates the pollution. Because of the existence of the externality, the firm producing the good does not internalize the full social costs of the good. In Figure 1, this effect is seen by having the marginal-private-cost curve (*MPC*) lie below the marginal-social-cost curve (*MSC*). The difference between the two curves is the social cost of the externality. Because the *MPC* curve can be understood as the supply curve (in a competitive industry) and the marginal-benefit curve (*MB*) can be understood as the demand curve, equilibrium quantity[87] (*Q2*) is higher than the socially optimal quantity[88] (*Q1*). Under a tradable permit system, the quantity of available permits is limited to restrict production to no more than the socially optimal quantity. In a tax system, a Pigouvian tax is imposed to internalize the social costs of that pollution. The amount of the tax is equal to the social cost of the externality (*t*). A firm paying the Pigouvian tax will have its *MPC* shifted up by the amount of the tax. As a result, the new *MPC* curve is now identical to the *MSC* curve, and the equilibrium quantity will now be the socially optimal quantity.

In a similar way to pollution, transactions that reduce liquidity generate externalities. When liquidity is reduced, the productive capacity of other firms may be reduced. These external effects are a market failure, because the firms engaged in the transaction that reduces liquidity do not consider the effects on other firms. Just as with pollution, we may need governmental intervention to address the externality of liquidity risks.

To better determine how we should address liquidity risks caused by hedge funds, we now examine how hedge funds affect liquidity. A comparison with bank runs, such as those that occurred during the Great Depression,[89] will aid this analysis. In a bank run, a cycle is created by a lack of confidence in banks. It starts with some loss of confidence in a bank. Then, because of this lack of confidence, depositors feel the need to withdraw funds from the bank. However, due to reserve requirements,[90] the bank must now acquire more cash in some way. It may have to sell some of its loans, which are its current assets, to raise the cash. In doing so, the bank will "deleverage" its loans. However, this deleveraging erodes the values of the loans, which means that the balance sheet of the bank is worse than before. As a result, depositors will lose confidence in the bank even further and withdraw more funds. This withdrawal of funds reduces the amount of loans that the banks are able to make, thereby directly reducing liquidity. And the cycle continues over and over.

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[86] *See* Dale B. Thompson, *Beyond Benefit Cost Analysis: Institutional Transaction Costs and the Regulation of Water Quality*, 39 NAT. RESOURCES J. 517 (1999).

[87] Equilibrium quantity occurs where supply equals demand, i.e. where *MPC* = *MB*.

[88] The socially optimal quantity occurs where the full marginal social cost is equal to the full marginal social benefit.

The negative impacts of reduced liquidity resulting from bank runs were a significant factor behind the Great Depression. During the Depression, the government established the Federal Deposit Insurance Corporation (FDIC) to address bank runs. The FDIC provided limited deposit insurance on bank deposits.[91] Although it was limited to a certain amount, this insurance greatly reduced the possibility of a bank run, thereby reducing liquidity risks.[92]

A similar cycle occurs for hedge funds. The cycle starts when there is an external event that causes a drop in the value of certain assets held by the hedge fund. Under "mark-to-market" accounting principles, this drop in the market value of the fund's assets must be recorded on the fund's balance sheet. The deterioration of the fund's balance sheet has two significant effects: short-term debt financing is more difficult, and the fund may be forced to take actions under covenants in long-term debt instruments.

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[89] Note, however, that there is less need to protect institutional investors in hedge funds than depositors of affected banks because institutional investors are better able to assess the risk of the fund.

[90] Under a reserve requirement, banks must hold a certain percentage of their loans as "reserves," i.e., cash or reserves with the central bank. When deposits of cash reserves flow out, a bank that previously met its reserve requirement no longer has sufficient reserves to cover their percentage of loans.

[91] Under the Glass-Steagall Deposit Insurance Act of 1933 (Banking Act of 1933), 48 Stat. 162, deposits were insured up to $2500. This amount has been raised many times, and currently stands at $250,000.

[92] The FDIC model is another one that might be considered in constructing the Superfund for hedge funds. The FDIC is a long-term solution not a temporary one, and is funded by risk-adjusted insurance premiums collected from banks. Also, it acquires "toxic assets" from banks upon their failure, such as what occurred during the Continental Illinois National Bank failure. *See* "Continental Illinois and 'Too Big to Fail,'" *in* FEDERAL DEPOSIT INSURANCE CORPORATION, 1 AN EXAMINATION OF THE BANKING CRISES OF THE 1980S AND EARLY 1990S, at 235-58 (1997), *available at* http://www.fdic.gov/bank/historical/history/235_258.pdf.

The fund will hold a portfolio of both long and short-term assets. The effect of the deterioration in the balance sheet is increased pressure to shift the portfolio away from long-term assets and towards short-term assets.[93] However, just as with banks, this deleveraging of long-term assets erodes their value.

If this is only happening to one fund, then this reduction in value may be negligible. However, the problem is exacerbated by a number of factors present in the operation of hedge funds. As noted above, hedge funds use significant amounts of leverage. This leverage magnifies the effects of losses. Also, hedge funds often are the "counterparties" of other funds in the market for derivatives.[94] Consequently, a complex web of relationships results when the balance sheet for one fund is harmed: that fund's counterparties now face increased "counterparty risk," i.e., the risk that the initial fund will default. This counterparty risk in turn means that the reduction in value will spread to other funds causing them in turn to shift their portfolio from long-term to short-term assets.

All of this activity by the funds means that they are making increased demands on the relatively fixed supply of short-run financing. Consequently, the result is to divert cash away from other activities into the funds. This diversion reduces liquidity, the scale of which is amplified by leverage and counterparty risk. Thus, the actions of hedge funds can lead to increased liquidity risks.

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[93] Note however that "lock-in" provisions of hedge funds, which prohibit withdrawals except at designated times, increase funds' flexibility in managing their mix of short and long-term loans.

[94] A "counterparty" is the other party in a derivative contract.

B. Valuation Problems

A closely related market failure for hedge funds is the reduction of the ability of market prices to provide relevant information about valuation. This effect has not previously been noted as a market failure because market failures have been thought to arise when something prevents an efficient trade. However, this view is limiting: it implicitly assumes that the predominant role of a market is to enable transactions. Additionally, markets provide information about valuation through market prices. This information helps consumers make choices and also helps businesses as they make decisions about future investment possibilities. When market prices no longer provide adequate information about valuation, markets are failing to fulfill their full roles for consumers and businesses. Consequently, recognizing this effect as a market failure is a significant contribution of this article. We will first examine how market prices provide valuation information in general and then discuss how the market failure may arise. After that, we will analyze how hedge funds actions may lead to this market failure.

Two of the most important lessons from an introductory course in economics are that the market equilibrium occurs where supply equals demand and that economic decision-makers (consumers, producers) maximize their behavior by setting marginal benefit equal to marginal cost. These two lessons are actually closely related.

In a competitive market, the market supply curve can be understood as the marginal cost curve of the producers making the product, and the market demand curve likewise as the marginal benefit curve of consumers. Consider a simple competitive market involving one firm and one consumer.[95] Let us assume that the firm's marginal cost curve (MC) grows exactly as quantity (Q) increases: $MC=Q$. Also, assume that the consumer's marginal benefit (MB) declines as quantity increases: $MB=2-Q$. In a perfectly competitive market, the firm will determine the quantity it produces by setting the market price equal to its marginal cost. Similarly, the consumer will determine the quantity it purchases by setting the market price equal to its marginal benefit. In this example, we find the market equilibrium will occur where price and quantity both equal 1.[96]

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[95] Generally, a competitive market implies we have many firms, but for clarity, we will consider the case with only one here.

What we see from this example is one of the significant benefits of markets: the ability of market prices to reflect the valuation of the good, at the margin. The producer sets the market price equal to its marginal cost, and this marginal cost reflects the marginal value of the good to the producer. Likewise, the consumer sets the market price equal to its marginal benefit, and this marginal benefit reflects the marginal value of the good to the consumer. Thus, market prices provide significant information about the marginal valuation of the good for both producers and consumers: these market prices are Adam Smith's "invisible hand."

However, market prices do not provide all of the information we need to know about valuation. For example, consider a corporate acquisition of Alpha Corporation by the Beta Corporation. Under corporate law, this acquisition would have to be approved by the shareholders of the Alpha Corporation, although this approval need not be unanimous. Assume Alpha's share price is currently trading for $20 per share. Beta proposes a tender offer of $25 per share for all of Alpha's shares. This represents a 25% premium over the current market price. Although this offer might seem to be "fair" based on the market price, nonetheless corporate law provides an alternative for shareholders of Alpha who wish to dissent from the acquisition: the right to an appraisal of the "fair value" of their shares.[97]

The reason why we need appraisal rights has to do with the range of valuation of different shareholders of the same company, as suggested by the literature known as "heterogeneous expectations."[98] Consider the following supply and demand diagrams for Alpha Corporation stock.[99] The demand curve for Alpha Corporation stock represents a set of valuations of Alpha by investors who might purchase the stock: as you reduce price from $*P1* to $*P2*, the additional quantity demanded (*Q2 –Q1*) means that there are (*Q2-Q1*) investors[100] whose valuation of Alpha is between $*P1* and $*P2*. In case I, there is not a wide variance in valuation by the different consumers. However, in case II, there is a wide variation: there are some who value Alpha Corporation stock significantly higher than the current market price of $20. In case I, a $25 per share tender offer would be "fair" to every shareholder because it would be greater than or equal to the implied valuation of every shareholder. However, in case II, there are a number of shareholders whose implicit valuation of Alpha exceeds $25. Appraisal rights would then be necessary to protect these shareholders, who otherwise might be outvoted.

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[96] *See* Figure 2.

[97] The appraisal right is the right to a "pro rata" share of a court-determined valuation of the entire corporation. *See* DEL. CODE ANN. tit. I, § 262 (2010).

[98] For more on "heterogeneous expectations," see Lynn A. Stout, *Are Takeover Premiums Really Premiums? Market Price, Fair Value, and Corporate Law*, 99 YALE L.J. 1235 (1990).

Thus, in this instance, although it does reflect the valuation of marginal shareholders, the market price does not sufficiently capture information about the valuation of Alpha by non-marginal shareholders. Thus, while market prices give good information about valuation at the margin, this no longer applies when we are not at the margin. In this case, this market failure is corrected by the corporate law instrument of appraisal rights.

Due to the nature of their operations, hedge funds can also create situations where we are no longer operating at the margin for some security, and hence market prices will no longer provide sufficient information about valuation. One situation arises due to leverage and the use of derivative instruments. Assume that a fund has determined that there seems to be a pricing discrepancy between a derivative and an underlying security. The fund then decides to use leverage to purchase a large quantity of derivatives. Sometimes these purchases are so large that the quantity of derivatives represents essentially the full quantity of the underlying security[101] that is reasonably available in the market.

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[99] *See* Figures 3 and 4.

[100] For clarity, we assume that each investor can purchase only one share of stock.

Although not done by a hedge fund, the recent episode of the "short squeeze" that Porsche performed on Volkswagen stock illustrates this well. Since 1960, ownership interests in Volkswagen had been effectively limited by the "Volkswagen law" that prevented any individual shareholder from exercising more than twenty percent of the voting rights in the company.[102] Starting in 2005, Porsche had begun accumulating Volkswagen stock but had been stymied in its efforts to assert greater control over Volkswagen.[103] However, in 2007, the European Union's highest court, the Court of Justice, ruled that this law was a "breach of the free movement of capital."[104] After this ruling, Porsche could now begin accumulating a larger ownership interest in Volkswagen.

It did this through the mechanism of "cash-settled options," in which "the buyer [of the option] gets the right not to stock but the cash difference between the options' 'strike price' and the market price of the shares when the options are exercised."[105] Sellers of these options "typically hedge their exposure by holding actual shares. That takes these shares out of circulation."[106] In Germany, while ownership stakes needed to be disclosed if options could be redeemed in shares, no disclosure was required for ownership stakes due to cash-settled options.[107] Consequently, Porsche was able to quietly amass a large ownership stake in Volkswagen.

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[101] And sometimes even more than the full quantity, such as was done recently by Amherst Holdings, which sold credit default swaps for mortgages, and then purchased the underlying mortgages, rendering the swaps worthless. *See* Gregory Zuckerman, Serena Ng & Liz Rappaport, *A Daring Trade Has Wall Street Seething*, WALL ST. J., June 11, 2009, at C1.

[102] Press Release, Court of Justice of the European Union, Judgment of the Court of Justice in Case C-112/05, Commission of the European Communities v. Federal Republic of Germany (Oct. 23, 2007), *available at* http://curia.europa.eu/en/actu/communiques/cp07/aff/cp070074en.pdf [hereinafter VW Law case].

[103] Mike Esterl & Edward Taylor, *As Giant Rivals Stall, Porsche Engineers a Financial Windfall*, WALL ST. J., Nov. 8, 2008, at A1.

[104] VW Law case, *supra* note 102, at 1.

[105] Esterl & Taylor, *supra* note 103.

[106] *Id.*

[107] *Id.*

On October 26, 2008, Porsche announced that it directly owned 42.6% of Volkswagen's common stock and held cash-settled options on another 31.5% of the shares.[108] At that point, the state of Lower Saxony also held 20% of Volkswagen's stock. Meanwhile, approximately "12.8% of VW shares were on loan, mostly to short sellers."[109] Adding the numbers together, we see that "[t]here weren't enough [Volkswagen shares] to go around."[110] The result was chaos:[111]

> When financial markets opened Monday Oct. 27, all hell broke loose. Funds that had borrowed VW shares and sold them, expecting no takeover offer and betting the stock would decline, raced to purchase shares to unwind the bets. . . . As hedge funds fought for the remaining VW shares, they drove the stock's price ever higher—deepening their losses. At the height of the short squeeze on Oct. 28, VW stock briefly topped €1,000, nearly five times as high as on Oct. 24, making VW the biggest company by stock-market value [in the world] for a few hours.[112]

In *Infectious Greed*, Frank Partnoy tells a similar story of how Paul Mozer at Salomon Brothers executed a "squeeze" of the market in newly issued U.S. Treasury notes.[113] For this market, there was a "when issued" market for about-to-be-issued Treasury notes. The general trend was for the price to rise in the "when issued" market, followed by a drop in the price after the notes were issued. As a result, there were opportunities for arbitrage that many traders attempted to exploit, by shorting Treasury notes in the "when issued" market and then repurchasing those notes after issue. Mozer realized however that "if he could control the Treasury auction, he could *squeeze* the other dealers doing the arbitrage, . . . forcing them to pay a premium to buy the precious, recently auctioned bonds."[114] After being warned a number of times by a Treasury official, Mozer was still able to eventually purchase "86 percent of the May auction" of 1991.[115] As a result of this position, "[t]he big squeeze was on. The price of the 2-year notes skyrocketed, and the holders of the notes made $30 million."[116]

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[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] This chaos would play a significant role in the suicide of "Adolf Merckle, the German billionaire whose speculation in volatile Volkswagen stock had pushed his sprawling business empire to the edge of ruin." Carter Dougherty, *Facing Losses, Billionaire Takes His Own Life*, N.Y. TIMES, Jan. 7, 2009, at B1.

[112] Esterl & Taylor, *supra* note 103.

[113] INFECTIOUS GREED, *supra* note 20, at 97-102.

What we see from these examples is that hedge funds (and other traders) can establish positions in a small market where they can exert significant market power due to their control over a large percentage of the available quantity of a specific financial instrument (Volkswagen stock in one case and a particular Treasury issue in another). When this happens, we are no longer at a marginal market equilibrium for that security where the market price reflects a trade between a buyer who wants to acquire a marginal quantity of the security and a seller who wants to sell a marginal amount of that same security, neither of which able to influence the price because their trading partner could easily find another willing seller or buyer.

Another situation where the price does not give information about valuation is closely related to liquidity risk. As noted above, in a liquidity crunch, hedge funds may create a situation in which they need to shift from long-term assets, such as financial derivatives, into short-term ones. This may lead to the result where a number of funds attempt to sell similar financial derivatives at a time where there are limited buyers.[117] These limited buyers essentially will then have monopsonistic power.[118] Similar to above, this then creates a situation where a true market equilibrium price cannot be established because we are no longer operating "at the margin."

The result of these situations of operating away from the margin is that market prices no longer provide adequate information about value of these financial products. When there is a significant gap between a large group of possible sellers and a small group of potential buyers, we lose the relatively equal bargaining position between the seller and buyer. Instead, the buyer has market power and can use that market power to extract a low price. As a result, market prices in these transactions no longer reflect marginal valuations.

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[114] *Id.* at 98.

[115] *Id.* at 101.

[116] *Id.* at 102.

[117] *See* Hugo Dixon and Richard Beales, *Regulating 'Shadow Banks,'* N.Y. TIMES, Feb. 24, 2009, at B2 (noting that "because the shadow banks moved as a herd, they helped inflate the bubble and worsened the bust").

[118] A *monopsonist* is a single buyer in a market and asserts market power similar to a monopolist, who is a single seller in a market.

This market failure has additional consequences. Due to "mark-to-market" accounting principles, hedge funds must use market transaction prices to determine the "market value" of their portfolio. This market failure means that the market prices used for this will inadequately reflect the true value of the affected financial securities. As a result, their balance sheet will be negatively impacted, and hedge funds again will face pressures to shift from long-term assets to short-term ones. This effect then creates a feedback loop that continues the cycle, leading to deeper liquidity risk.

V. INSTRUMENTS TO ADDRESS MARKET FAILURES

We now turn to examine instruments to address the market failures of liquidity risk and valuation. Typically, we use government intervention to address market failures, however, private institutions can also be used to address market failures. Nonetheless, in the case of hedge funds, our recent experience may cast some doubt on the effectiveness of addressing these failures primarily through private institutions.

In addition to these market failures, there is another market failure that affects financial securities: insufficient provision of the public good of information about the quality of these products due to the high costs of collecting this information. We address this failure somewhat through mandatory disclosure requirements.[119] Nonetheless, even with this information, it is still difficult to assess quality. As a result, a particular set of private institutions have arisen to provide the public good of information about credit securities: credit rating agencies such as Moody's and Standard and Poor's. However, the performance of credit rating agencies as "gatekeepers" during the past ten years has been significantly criticized with many pointing to their failure as one of the principle causes of the current financial crisis.[120] In particular, conflicts of interests between the credit agencies and the financial firms evaluated by them but who pay these agencies fees suggest the difficulties in using private institutions in this case.

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[119] *See supra* Part III (discussing disclosure requirements under federal securities laws).

Instead, we should turn to public institutions and use government intervention to address the market failures caused by hedge funds. Our experiences with using government intervention to address market failures in environmental protection can be helpful in assessing alternatives for hedge funds. In environmental protection, the principal instrument is that of command-and-control regulation. Others include economic-incentive-based instruments such as tradable permit systems and tax systems.

A. Problems with Command-and-Control Regulation for Hedge Funds

One way to address these market failures would be to closely regulate hedge funds. This regulation could take a number of forms: specific reserve and margin requirements for certain types of trades, restrictions on other types of trades, and prohibitions on yet other trades. As noted above, a number of commentators have suggested additional regulation of hedge funds. However, there are a number of problems with regulating hedge funds.

Specific reserve and margin requirements would reduce the amount of leverage that a hedge fund can undertake. However, unless the specific requirements are connected to levels of liquidity risk,[121] these requirements will not directly address liquidity risk. Indeed, as we have seen from bank runs, reserve requirements themselves can lead to a self-perpetuating cycle that increases liquidity risk.

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[120] *See* INFECTIOUS GREED, *supra* note 20; Frank Partnoy, *The Siskel and Ebert of Financial Markets: Two Thumbs Down for the Credit Rating Agencies*, 77 WASH. U. L.Q. 619 (1999); Frank Partnoy, *How and Why Credit Rating Agencies are Not Like Other Gatekeepers*, *in* FINANCIAL GATEKEEPERS: CAN THEY PROTECT INVESTORS? (Yasuyuki Fuchita & Robert E. Litan eds. 2006).

[121] To be connected, the reserve and margin requirements would need to vary according to the level of liquidity risk.

Furthermore, recall the social benefits we derive from the operation of hedge funds, discussed in section II above. Regulations that prohibit strategies employed by hedge funds could eliminate many of these benefits.

More importantly, it is unlikely that any regulatory system would be able to keep up with the rapidly changing strategies of hedge funds.[122] Hedge funds are under competitive pressure to innovate because strategies that were once successful are imitated to the point where competition over the same strategy erodes available profits.[123] Under constraints imposed by a fixed regulation, a hedge fund might devise a strategy around the regulation that achieves a similar result as the strategy nominally prohibited by the regulation. We have seen this before in the example of Bankers Trust developing an investment product to get around Japanese regulations restricting stock ownership by insurance companies. Indeed, as noted by Partnoy, the opportunity to work around existing regulations provides hedge funds opportunities to continue to extract significant profits: "Bankers Trust had demonstrated that regulation-avoiding trades were not only very profitable – they had staying power."[124] The ability to capture these profits will provide strong incentives for hedge funds to innovate around specific regulations, leaving them ineffective.

In the end, these regulations may end up being both detrimental and ineffective. As Richard Thaler has argued, "There's no evidence . . . that regulators could actually determine appropriate leverage for specific investments, for example, and [meanwhile,] 'heavy-handed regulation' could shut down financial markets and weaken the economy further."[125] Instead, it may be better to try a different approach for government intervention.

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[122] Verret, *supra* note 44, at 799-800, notes, "[T]hese innovative strategies morph so rapidly and operationally they are so much leaner, that the simple regulatory strategies . . . do not lend themselves to cookie cutter application."

[123] *See* INFECTIOUS GREED, *supra* note 20, at 40-41.

[124] *Id.* at 72. *See also id.* at 49 ("Substantial fees from these complex swaps would persist so long as companies valued the difference in legal treatment between swaps and their regulated brethren.").

[125] Jeff Sommer, *When Humans Need a Nudge Toward Rationality*, N.Y. TIMES, Feb. 8, 2009, at BU4.

B. Economic-Incentive-Based Instruments: Permits & Taxes

In environmental protection, we have seen that command-and-control regulation can lead to significant improvements in environmental quality. However, when additional innovation is necessary, we sometimes turn to economic-incentive-based instruments like tradable permits or taxes. For example, in the 1990s, the Los Angeles area had the strictest air quality controls in the entire country. Nonetheless, additional improvements in air quality were needed. Rather than adopting additional regulations to control nitrogen oxides and sulfur oxides, the regulatory body for Los Angeles – the South Coast Air Quality Management District – decided to use a tradable permit system, RECLAIM, to enable stronger incentives to develop technological advancements in controlling emissions.[126]

Economic-incentive-based systems are easier to manage in a dynamic environment than command-and-control systems. With economic-incentive-based systems, the regulatory agency uses a single variable to achieve desired environmental quality: with a permit system, the agency controls environmental quality by adjusting the quantity of permits available, and with a tax system, the agency controls quality by adjusting price, i.e. the amount of the tax. With a command-and-control system, the agency has to adjust technological rules imposed on a variety of different industries, and these technologies are constantly shifting.

In theory, a permit system should be able to achieve the same result as a tax system, as seen above.[127] However, in practice, certain considerations lead to the use of either a permit system or a tax system.[128] One key consideration is the amount of information needed by the agency. To determine an optimal quantity of permits, the agency needs information about the marginal benefit, marginal private cost, and the social cost of the externality. However, for the tax system, the only information required to determine the tax is the social cost of the externality.[129] Consequently, a tax system should be simpler to construct to address the externalities caused by hedge funds.

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[126] *See* Thompson, *supra* note 86.

[127] *See supra* Part IV.A and Figure 1.

[128] One big advantage of a permit system is the ability to "grandfather" permits to businesses that had been emitting previously. This grandfathering improves the political feasibility of a permit system.

VI. THE SUPERFUND FOR HEDGE FUNDS

We have seen how the operation of hedge funds can lead to two market failures: liquidity risk and problems with using market prices for valuation. In general, it is better to use at least as many instruments as the number of goals to be achieved. Consequently, to address these two market failures, the Superfund for hedge funds will consist of two components: a tax on hedge funds, assessed depending upon the liquidity risk their transactions reflect; and a fund for purchasing securities whose value may not be reflected by current market prices. Additionally, certain components of command-and-control regulation will be needed to implement the Superfund.

A. History of the Superfund Under CERCLA

Before examining the details of the Superfund for Hedge Funds, it will be helpful to review the Superfund established to clean up contaminated sites. The Superfund arose out of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980.[130] This Act provided for a "Superfund" to be established to pay for the cleanup of hazardous waste sites when potentially responsible parties (PRPs) could not be found or otherwise could not afford the cost of the cleanup. This Superfund was initially funded by an excise tax on "petroleum, petrochemicals and inorganic chemicals,"[131] which were the products causing the contamination of these sites.[132] The idea behind this tax was the "polluter pays" principle, which says that we should address the externality of environmental damage through a Pigouvian tax on those responsible for the damage. Because the chemical and petroleum industries were the ones who initially manufactured the products contaminating these sites, this tax was imposed on their products. However, some criticized this tax because it was not calibrated to impose a lower tax on those "who safely handle dangerous substances [and instead acts] to subsidize those who do not."[133]

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[129] Enforcement is also required under both permit and tax systems.

[130] 42 U.S.C. §§ 9601–9675 (2000). For more on CERCLA, see Dale B. Thompson, *Valuing the Environment: Courts' Struggles with Natural Resource Damages*, 32 ENVTL. L. 57 (2002).

[131] Rashida Belal, *Superfund for Environmental Taxes, 1981 and 1982*, STATISTICS OF INCOME BULLETIN, Fall 1983, at 31, *available at* http://apps.irs.gov/pub/irs-soi/83rpfallbul.pdf.

Thus, the Superfund under CERCLA contained two components to address two market failures: overproduction of harmful substances (an externality) and inadequate provision of the public good of cleanup. The first was the tax on chemical and petroleum products to provide (imperfect) incentives to reduce the quantity sold of these potentially harmful products. And the other was the pooling of these tax revenues into a trust fund to pay for cleanup of hazardous sites. The Superfund for hedge funds will use a similar structure, although the tax will be calibrated to the level of liquidity risk, in order to provide improved incentives.

B. Pigouvian Tax to Address Liquidity Risk

The principal component of the Superfund will be a tax collected from hedge funds, designed to provide incentives to reduce liquidity risks. The tax should be set at levels that increase as the level of liquidity risk increases.[134] In order to assess this tax then, we will need appropriate models of how the particular strategies pursued by a hedge fund increases liquidity risks.

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[132] This tax was last collected in 1995. Meline G. MacCurdy, *Reinstatement of Superfund Tax Proposed in Congress, Presumed in Obama's Budget*, MARTEN LAW, Apr. 22, 2009, http://www.martenlaw.com/newsletter/20090422-superfund-tax-reinstated.

[133] Bruce Bartlett, *The Case Against a Value-Added Tax*, 468 HERITAGE FOUND. BACKGROUNDER 9 (1985) (quoting Richard A. Epstein, *The Principles of Environmental Protection: The Case of Superfund*, 2 CATO J. 9, 33 (1982)), *available at* http://www.heritage.org/research/ axes/bg468.cfm.

[134] This article explains how liquidity risks lead to market failures, and hence need to be addressed. However, other forms of systemic risk such as counterparty risk could also be addressed by this tax system with the level of tax calibrated also with the level of other associated risks.

One model that has been popularly used by hedge funds themselves to assess their own risks is the Value-at-Risk (VaR) model.[135] The VaR model is used to construct an estimate of the maximum loss that can occur with a given probability over a period of time. This model became very popular, particularly after the free availability of the Risk Metrics software package from J.P. Morgan in 1994,[136] because it can be applied using a very limited amount of data.[137] However, many have criticized the use of these models to assess risk because they make unrealistic assumptions based upon incomplete historical data. For example, Andrew Lo argues that these models inadequately deal with "tail risk," "nonlinear risks," and "serial correlation."[138] Indeed, some have suggested that overreliance on these models was one of the causes of our recent financial crisis.

Instead, we need to find other models to assess liquidity risks.[139] Lo has noted that "there has been much progress in the recent literature in modeling . . . liquidity risk."[140] In particular, he explains, "[a] more immediate method for gauging the liquidity risk exposure of a given hedge fund is to examine the autocorrelation coefficients Pk of the fund's monthly returns."[141] Other models for better understanding liquidity and other risks include "small-world" network models,[142] phase-locking models,[143] and fractal models.[144]

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[135] For more on Value-at-Risk, see MOORAD CHOUDHRY, AN INTRODUCTION TO VALUE-AT-RISK (4th ed. 2006).

[136] *Id.* at 30.

[137] Under the variance-covariance method, assumptions of normal distribution for returns and constant correlations of risk factors means that all that is needed to assess risk are variances and covariances. More sophisticated techniques such as Monte Carlo simulations can be applied, and use more information. *Id.* at 33-35.

[138] ANDREW W. LO, HEDGE FUNDS: AN ANALYTICAL PERSPECTIVE 7-30 (2008).

[139] Developing models to assess liquidity risks associated with hedge funds will be inherently difficult, because hedge funds seek new profit opportunities from trades that are "on the edge." Nonetheless, it will be important to attempt to assess these risks, in order to institutionalize consideration of the externality effects of liquidity risks from these trades.

[140] LO, *supra* note 138, at 25 (citing RICHARD BOOKSTABER, A FRAMEWORK FOR UNDERSTANDING MARKET CRISIS, *in* RISK MANAGEMENT: PRINCIPLES AND PRACTICES (1999)); Richard Bookstaber, *Understanding and Monitoring the Liquidity Crisis Cycle*, 56 FIN. ANALYSTS J. 17 (2000); Duen-Li Kao, *Estimating and Pricing Credit Risk: An Overview*, 56 FIN. ANALYSTS J. 50 (2000)).

[141] LO, *supra* note 138, at 26.

These models would then be utilized to construct estimates of liquidity risk associated with the trading strategies adopted by each fund. The level of tax assessed would then be calibrated to the level of risk. As a result of the tax, trading strategies that involve higher levels of risk will now have lower returns. In particular, leveraged trading strategies that inherently offer higher risks will face a higher tax. The tax then will therefore provide an incentive for hedge funds to choose strategies that have lower liquidity risks, thereby addressing this externality.[145]

C. Superfund to Fund Purchases of Illiquid Securities

The second market failure that needs to be addressed by the Superfund is the inability of market prices to provide adequate information on market valuation. We have seen that under certain circumstances, the activity of hedge funds can lead to situations where market prices no longer provide sufficient information about the value of financial instruments. This can lead to a cycle in which these valuation problems increase liquidity risks, which in turn increase valuation problems, and so on. Some external action would then be necessary to break this cycle.

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[142] Network models examine how shocks in one part of a system are passed along to other parts along the network. *See* DUNCAN J. WATTS, SMALL WORLDS: THE DYNAMICS OF NETWORKS BETWEEN ORDER AND RANDOMNESS (Philip W. Anderson et al. eds., 1999), *cited in* LO, *supra* note 138, at 26.

[143] Phase locking models explain how seemingly uncorrelated returns become strongly correlated, due to the occurrence of a previously unobserved event. *See* LO, *supra* note 138, at 18-22.

[144] Fractal models suggest that returns do not conform with normal / Gaussian distributions (which are implicitly assumed in standard financial models such as the Capital Asset Pricing Model and Value-at-Risk), which state that extreme events occur with low probability. Instead, fractal models suggest that these extreme events may occur with much higher probability. *See* BENOIT MANDELBROT & RICHARD L. HUDSON, THE (MIS)BEHAVIOR OF MARKETS (2004).

[145] It should be noted that power of the tax is to not necessarily micro-manage each specific trade but more to instill an incentive system in which traders first recognize that risky trades may get taxed more later and to force that consideration into their decision matrix.

To address this, the Superfund for hedge funds would use a trust fund similar to the fund under the Superfund under CERCLA. The CERCLA Superfund provided centralized funding for cleanup of contaminated sites financed by the tax collected from the chemical and petroleum industries. Likewise, the Superfund for hedge funds would provide centralized funding for attempting to "clean up" the failure of market prices not reflecting valuation. It would do this by actively participating in purchases of the "toxic" financial instruments. By purchasing these toxic securities at a time when other market participants are unwilling to do so, the Superfund could then break the cycle and begin to move market transactions back to the point where market prices would reflect marginal valuations.[146]

This trust fund would operate similarly to the Troubled Assets Relief Program (TARP) that is being applied currently by the United States Government. A significant difference though would be that while TARP is a temporary program, the Superfund would continue in operation to address this market failure. Under TARP, the U.S. Treasury can purchase "troubled" assets such as mortgages and other financial instruments. One of the major issues facing TARP is due to this market failure: how much should the Treasury pay for these "toxic" assets when the market prices no longer adequately reflect their true value?[147] Underpaying for these assets could "force institutions selling and others holding similar investments to register crushing losses that could deplete their capital and make it harder for them to increase lending," while overpaying "would bail out the companies . . . at the expense of taxpayers."[148]

This article does not attempt to determine the correct way to value these assets. Rather than having the Superfund directly assess the value of these assets, an alternative has been suggested by Lucian Bebchuk.[149] Bebchuk proposes funding a number of financial managers in a competitive market, whereby the managers derive their payoff from long-term returns. For example, the total amount that the Superfund decides to use to purchase "toxic" assets could be divided between twenty different funds. This decentralized approach has significant advantages over a centralized approach conducted by a single government agency. As Bebchuk notes, "The competition among these 20 funds would prevent the price paid for the [toxic] assets from falling below fair value, and the fund managers' profit incentives would prevent the price from exceeding fair value."[150] Additionally, provision of competition would erode the monopsonistic market power that can result when there is a liquidity crunch.[151] Bebchuk suggests this mechanism could be augmented by auctioning off the right to be one of these funds (and consequently using those auction revenues to help fund the purchases).[152]

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[146] It should be understood that while it is possible and preferable that the Superfund's activities could break this cycle, other instruments may nonetheless still be necessary under certain circumstances. Nonetheless, the existence of the Superfund could reduce both the need for and the magnitude of these other instruments.

[147] Vikas Bajaj & Stephen Labaton, *Risks are Vast in Revaluation of Bad Assets*, N.Y. TIMES, Feb. 2, 2009, at A1.

[148] *Id.* at A11.

[149] *See* Bebchuk, *supra* note 10.

There are two historical factors that suggest this mechanism might be effective. One is the fact that when deposit insurance was introduced, although this insurance was incomplete (deposits only to a certain amount were covered), it nonetheless was effective in restoring confidence in the banks and reducing the incidence of bank runs. In a similar manner, although this Superfund would also be incomplete in that it would not be able to purchase all "toxic" financial assets,[153] nonetheless by breaking the liquidity risk cycle, it could lead to partial restoration of confidence of private actors in participating in the market for these assets.[154]

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[150] *Id.* at 5.

[151] *See supra* section IV.B.

[152] Bebchuk, *supra* note 10. The problem of the "winner's curse" – in which there is a disincentive to bid because the winning bid represents the highest valuation and hence is almost surely an overestimate – can be addressed by proper auction design, such as allocating the twenty funds according to the top twenty bids but charging each one a fee equal to the twentieth highest bid.

[153] Recall that the scope of the Superfund for hedge funds is more limited than Schwarcz's LPOLR. *See supra* text accompanying notes 65-66.

[154] As noted above, the goal of the Superfund is to be self-perpetuating, continually addressing the market failures caused by hedge funds specifically. It is not designed to address other financial sectors that are currently addressed through regulatory mechanisms. In contrast, the TARP is designed to address the full restoration of confidence in all financial sectors. While the actions of Superfund may be insufficient to achieve a

The Superfund would also benefit from the possibility that, given a broad portfolio and sufficient time, the depressed market transaction prices for these assets could eventually recover to the point where the fund overall could profit from its portfolio. In the case of Long Term Capital Management, we saw that the consortium that purchased a large portion of LTCM's assets at prices that were substantially depressed due to their associated liquidity risks was eventually able to profit from this purchase due to the eventual recovery of the market prices for these assets. If the Superfund's portfolio can show eventual gains, this will increase the feasibility of purchasing the portfolio with a given amount of taxes collected to finance the Superfund.

VII. COMMAND-AND-CONTROL COMPONENTS NECESSARY TO IMPLEMENT THE SUPERFUND FOR HEDGE FUNDS

In our experiences with environmental protection, we have seen that even when we choose to adopt an economic-incentive-based instrument, these instruments nevertheless may rely on elements from command-and-control regulation. In the 1990s, the air quality management district for the Los Angeles area attempted to implement an economic-incentive-based instrument for reducing emissions of three pollutants: nitrogen oxides (NOx), sulfur oxides (SOx), and volatile organic compounds (VOCs). It was able to implement an emissions market for NOx and SOx but not for VOCs. In an earlier article, this author determined that one of the principal obstacles to the VOC market was the lack of consensus on future VOC emissions abatement technology. For NOx and SOx, this consensus had been developed through the regulatory rulemaking process, but because VOCs were relatively unregulated, no similar consensus existed. This experience suggested that "command-and-control regulation may be a necessary prerequisite for the implementation of an emissions market."[155]

Therefore, to properly implement the economic-incentivebased Superfund for hedge funds, we may also need to

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complete restoration of confidence, the more limited goals must be remembered. *See supra* text accompanying notes 146-47.

[155] Thompson, *supra* note 86, at 694.

adopt certain command-and-control regulatory components. In the RECLAIM example, we saw that in order to allocate permits, we needed to know the inventory of existing emissions, i.e. what facilities were emitting how much pollutant. This was needed to provide a baseline, both from which to determine how many permits each firm would receive and also to assess the universe of firms emitting pollutants. This inventory required both a listing of facilities emitting pollutants and a detailed list of pollutant emissions from each facility.

In a similar manner, we will need to determine the universe of hedge funds conducting activities that may lead to liquidity risk. In order to do this, we will first need to "inventory" hedge funds. This would be done initially through a requirement to register all hedge funds. Then, we would need to know each individual fund's "emissions." This would be done with a requirement to report regularly the entire holdings of a fund. Based upon these holdings, the Superfund authority would then levy a tax on the hedge fund.

The requirement for a hedge fund to disclose its holdings to the Superfund authority would be very controversial. Hedge funds are extremely secretive about their trading strategies: "Trading strategies are highly proprietary and therefore must be jealously guarded lest they be reverse-engineered and copied by others."[156] As a result, many would contest turning over their complete holdings to a regulator. As Richard Thaler has noted, "'The trick is to try and figure out a way of forcing these firms to disclose more of what they're doing without giving away so much that they can no longer make a living.'"[157] One trick that might work is to have the fund turn over information with a significant lag, such as ninety days. As long as the effective tax on these strategies is transparent, the Superfund could collect lagged information on holdings and still provide disincentives against strategies that increase liquidity risk. Funds may be more willing to turn over lagged information.[158]

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[156] LO, *supra* note, 138 at 2; *see also* INFECTIOUS GREED, *supra* note 20, at 88 (discussing the secrecy around the trading strategies used by John Meriwether at LTCM, even after close inspection*); id.* at 256 (noting that funds "needed to keep their strategies secret or other investors would mimic them, thereby eroding the profit opportunities").

[157] Sommer, *supra* note 125.

Another command-and-control component arises from the calculation of this tax. The Superfund should base this tax on the level of liquidity risk associated with the holdings of the hedge fund. However, this brings up the issue as to how to assess the level of liquidity risk. In Section VI.B, we discussed possible techniques for assessing liquidity risk. However, the Superfund should strive to refine this assessment and make it as transparent as possible to increase its incentive effect.[159]

The process of refining the accuracy of assessing liquidity risk is similar to determining appropriate technologies for emissions reductions. The process of determining appropriate emissions technologies is done through rulemaking, including notice and opportunities to comment. In a similar manner then, the Superfund should incorporate public rulemaking procedures to determine the best way to assess the liquidity risks of strategies pursued by hedge funds.[160] These public rulemaking procedures would also then improve the transparency of the tax,[161] so that funds would better predict the level of the Superfund tax for a given strategy.[162]

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[158] Even with a ninety day lag, hedge funds likely will still object to disclosing their trading positions. This is particularly true for funds with longer holding periods because the lagged holdings will reflect their long-term strategy. Funds might respond by "gaming" the disclosure – adjusting their positions right before their reporting date and then readjusting after reporting. Despite this possibility, the Superfund would need to rely on the promise of confidentiality to induce funds to report truthfully. This would likely take some time to develop trust in this confidentiality. An opposite response would be to increase the frequency of reporting and shorten the lag, i.e. the "stick" to the "carrot" of confidentiality.

[159] It should also be noted that assessment of this risk will require not only analysis of the data provided by hedge funds but also information on trading positions collected under the regulatory structure for other financial sectors.

[160] Rulemaking is also commonly applied to regulation of other financial sectors. For example, see Cindy R. Alexander & Yoon-Ho Alex Lee, *The Dynamics of SEC Rulemaking: Evidence on the Informational Environment around SOX Rules*, Presentation at Midwestern Law and Economics Association 2008 Annual Meeting, (October 4, 2008). The author would like to thank participants at this Meeting for this suggestion.

[161] Another concern would be the level of the tax. While the tax should be set high enough to reduce liquidity risks, it should not be set so high that it discourages all trading. This can be accomplished by using a relatively low level of the tax at the beginning and periodically assessing whether the tax is effective at that level. As a pricing system, a tax has a large advantage over a permit system (in which you have to pre-determine the level of permits over time), due to the simpler method of making adjustments based on experience.

Thus, although the Superfund would primarily utilize market mechanisms to address the market failures of hedge funds, the ability to use these market mechanisms would depend on the application of these command-and-control regulatory components.

VIII. INTERNATIONAL COORDINATION

One obstacle that the Superfund would face in addressing these market failures is the possibility that, faced with the reporting and tax requirements of the Superfund, hedge funds would simply relocate out of the jurisdiction of the United States. If so, the effectiveness of the Superfund could be limited. To a certain degree, this possibility can arise under any approach to address the market failures of hedge funds: if full command-and-control regulation is chosen, hedge funds likewise might relocate. However, certain factors suggest this effect may be limited.

One is that the United States could impose its jurisdiction on a fund in which a United States citizen invests. International law would limit the amount of the tax that could be extracted from that fund to the amount represented by the proportional holdings of U.S. citizens in the fund, not the entire balance of the fund. Nonetheless, the registration and reporting requirements could remain valid.

A more effective response to this possibility would be through international coordination. International coordination is extremely difficult, partly due to the "free rider" effect. The "free rider" effect suggests that when faced with the decision as to whether to impose rules that bring concentrated costs on its own citizens but diffuse benefits to its own and other citizens, a jurisdiction will have the incentive to "free ride." That is, rather than imposing the rules on its own citizens and receiving increased partially increased benefits, the jurisdiction will rely on the diffuse benefits from the rules already imposed on other jurisdictions, thus getting a "free ride" on the efforts of others.

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[162] As noted above, the Superfund tax can also address other types of risks associated with hedge funds' investment choices. *See supra* note 139 and accompanying text. If so, these same rulemaking procedures can be utilized to determine the relative magnitudes of the taxes for different types of risks.

Despite the difficulties of international coordination, there has been a growing recognition that this coordination is necessary for the financial system.[163] The effects of the current financial crisis have spread from the United States to countries around the world. Consequently, a number of European countries have begun to examine regulating hedge funds also.[164]

Although he had previously "supported an industry-led 'code of conduct' for hedge funds," European Central Bank President Jean-Claude Trichet recently proclaimed his support for regulating hedge funds: "'The current crisis is a loud and clear call to extend regulation and oversight to all systemically important institutions—notably hedge funds and credit-rating agencies.'"[165] Lord Adair Turner, chair of Britain's Financial Services Authority, also advocated possible regulation of hedge funds:

> 'We allowed a series of near banks and shadow banks to grow without being regulated,' . . . In a new regime, . . . one rule must be, 'If it looks like a bank and quacks like a bank, we have to regulate it like a bank,' . . . [including] wide discretion to get information on how hedge funds and other institutions are operating, with the ability to impose regulation if they start to act too much like a bank.[166]

Meanwhile, international hedge funds themselves see that regulation is coming and are attempting to preempt it through self regulation. Recently, the Alternative Investment Management Association, a leading British hedge fund association with international membership, announced its planned proposal that "hedge-fund managers agree to changes . . . includ[ing] registering with regulators and having regular contact with authorities about their businesses."[167] As other countries and the funds themselves recognize that prevention of future crises will require concerted effort, international coordination of approaches to hedge funds will become more feasible.

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[163] *See* Floyd Norris, *Danger in Government Directing Capital*, N.Y. TIMES, Jan. 30, 2009, at B1 (noting that "there is much talk about how to reform the regulatory systems around the world, and how to standardize regulation to avoid the 'regulatory arbitrage' of seeking out jurisdictions with the least stringent rules.").

[164] *See* Dixon & Beales, *supra* note 117 (noting that "the political momentum for regulating shadow banks is building in advance of a meeting in April in London of representatives of the Group of 20 economies.").

[165] Joellen Perry & Gabriele Parussini, *Trichet Backs Increase in Market Regulation*, WALL ST. J., Feb. 24, 2009, at A10.

[166] Norris, *supra* note 163, at B4.

CONCLUSION

The depths of the current financial crisis cry out for drastic solutions. Some have called for new regulations, including registration requirements, reporting of assets, reserve requirements, restrictions on leverage, and restrictions on trading strategies. Others have called for taxing all financial service transactions. Others have called for the establishment of a government agency to purchase "toxic" financial assets, thereby becoming a "liquidity provider of last resort."

This article argues that the appropriate long-term solution to the problems presented by hedge funds is a combination of these approaches: establishment of a Superfund consisting of the market mechanisms of a tax on hedge funds, whose funds are then used to conduct market purchases of "toxic" financial assets, all of which supported by regulations necessary to operate these market mechanisms. This article develops this solution by focusing on the market failures caused by hedge funds and then considering possible solutions through the prism of our past experiences with environmental protection.

The two principal market failures caused by hedge funds are externalities posed by liquidity risks and the inability of market prices to provide information about the valuation of financial securities. Our experiences with the difficulties in using command-and-control regulation to reduce the environmental impact of industries engaged in rapid technological change suggest that the use of command-and-control regulation as the primary instrument to address innovative hedge funds will be inappropriate. Instead, these experiences suggest an alternative structure of the Superfund.

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[167] Cassell Bryan-Low, *Hedge Funds to Propose Overhaul Plan*, WALL ST. J., Feb. 24, 2009, at C3.

While there were many problems with the implementation of the original Superfund for the petroleum and chemical industries,[168] nonetheless, the basic structure was sound: combine a tax to create incentives to reduce risky behavior and then use the tax revenues to fund cleanup of toxic sites. The Superfund for hedge funds proposed here adopts the same structure to address these two market failures caused by hedge funds: a tax calibrated with the levels of liquidity risk to reduce the incidence of externalities associated with liquidity risk and then the use of those funds to help "clean up" the problem of illiquid securities whose market prices do not reflect valuation. This cleanup could be done by providing government funding of a number of competitive financial managers, whose compensation would depend upon long-term returns.

Our experiences with environmental protection also suggest that market instruments need to be built upon a foundation of command-and-control regulatory components. Consequently, to implement these market mechanisms to address the market failures of hedge funds, we will likewise need supporting regulatory elements. These elements include registration of hedge funds, reporting of the funds' assets, and rulemaking procedures to assess liquidity risks.

The registration and reporting requirements under the Grassley-Levin legislation is the first step to complete the Superfund package. Additional legislation would be needed to authorize a tax on hedge funds, create the rulemaking procedures for assessing liquidity risks, and enable the use of the hedge fund tax revenues for funding a competitive market in illiquid financial securities.

When completed, the Superfund for hedge funds will provide an adaptive, flexible mechanism for addressing the market failures caused by hedge funds.[169] Unlike command-and-control regulation that would limit investment strategies and the creation of new financial instruments, the tax and market purchase programs would allow innovation by hedge funds. Meanwhile, because they are not tied to any particular strategies or financial securities, the tax and market purchase programs could adapt to these innovations in order to provide incentives to reduce the externalities of liquidity risks, and to provide a mechanism for moving transactions in illiquid financial instruments back to the margin where market price will then provide useful information on valuation.

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[168] *See* Bruce Yandle, *Taxation, Political Action, and Superfund*, 8 CATO J. 751 (1989).

[169] As noted above, this Superfund structure could also be extended to cover other financial sectors. *See supra* note 6 and accompanying text.

We see then that one "invisible hand"— market price—is not sufficient to keep hedge funds along the correct path. But with two more "invisible hands"—the liquidity risk tax and market purchase program for illiquid securities, the Superfund for hedge funds will "nudge" hedge funds in the right direction.

FIGURES

Figure 1: Externalities

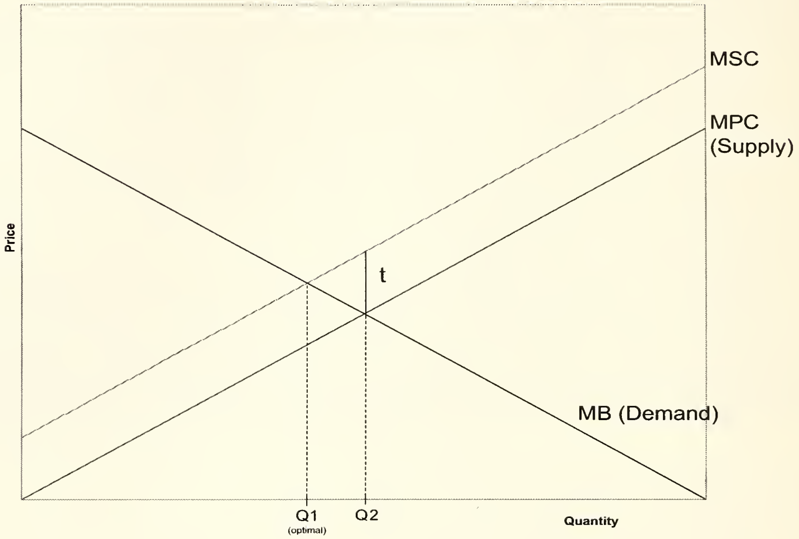


Figure 2: Competitive Equilibrium

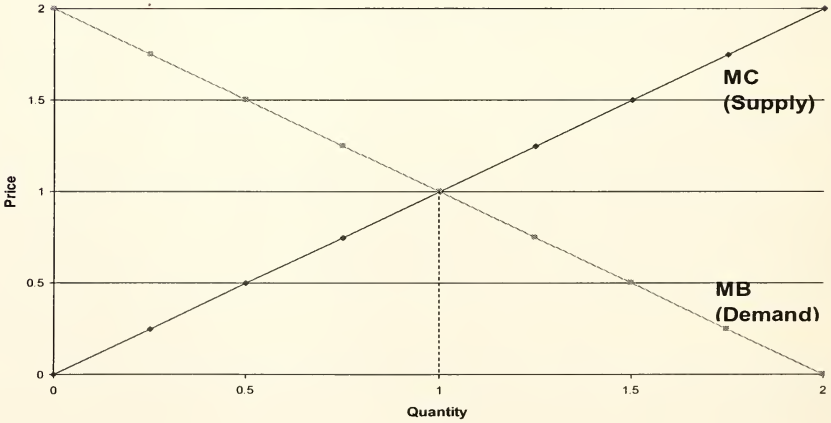


Figure 3: Alpha Stock, Case I

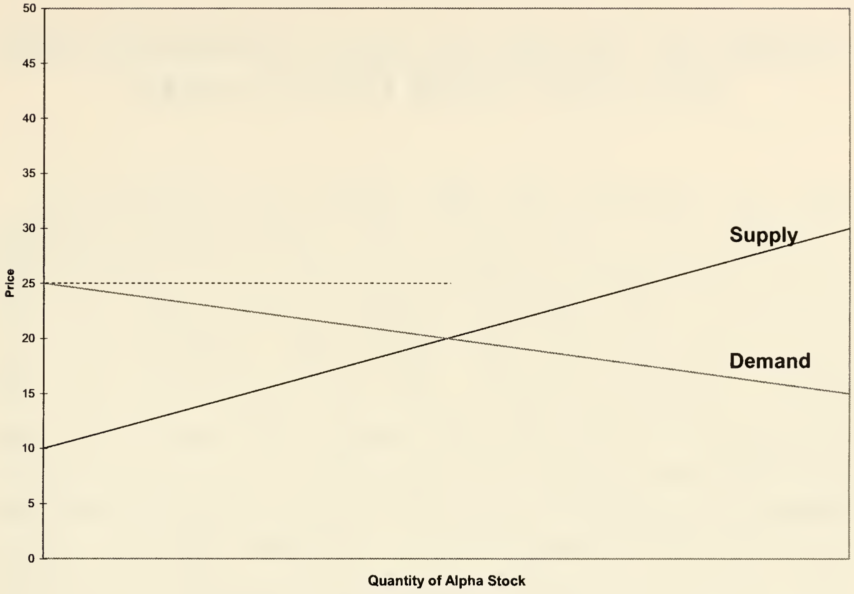
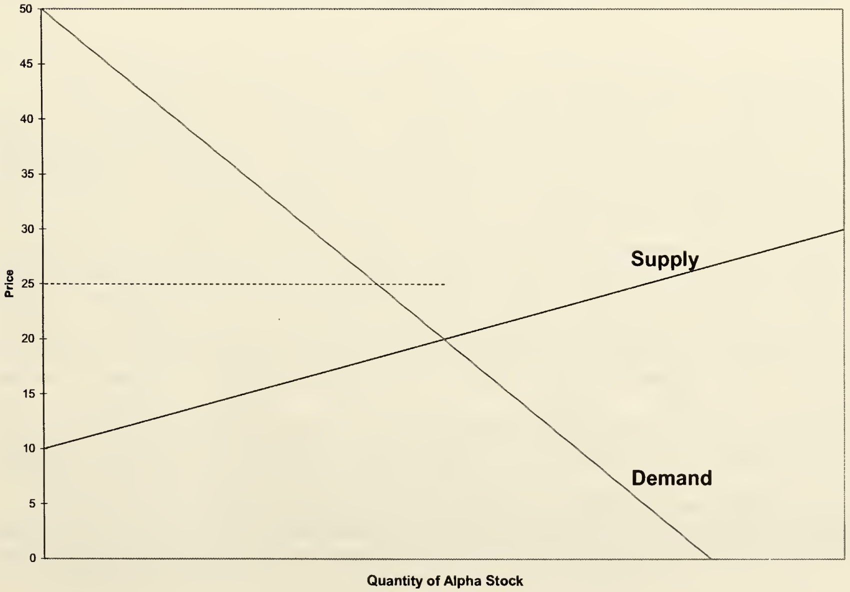


Figure 4: Alpha Stock, Case II



COMMENT

THE CURIOUS CASE OF KEVIN TRUDEAU, KING CATCH ME IF YOU CAN

If you have ever watched late night television, you have probably stumbled across the cure for cancer, debt, and obesity all thanks to Kevin Trudeau's infomercials promoting his books that have the answers to almost everything. The self proclaimed "consumer advocate" has written books where he claims to blow open the conspiracy against the American consumer.[1] Oozing with slick, televangelist style during every infomercial, Trudeau vaguely explains how doctors, pharmaceutical companies and the government are in bed together in a super-sized plot to keep America sick and overweight.[2] Trudeau's ranting less resembles science and more the plot of the latest bestseller partly because his lack of evidence and his blatant refusal to ground any of his theories in reasonable proof.[3] In the infomercial for his controversial book, *The Weight Loss Cure "They" Don't Want You to Know About*, he praises a miracle cure that was discovered in the 1950's by Dr. A.T.W. Simeons.[4] However, he fails to tell the consumers exactly what his miracle cure entails: a rigorous four phase diet plan that has a strict five hundred calorie limitation, recommends fifteen colonics in thirty days, recommends injections of a drug that is unavailable in the United States for weight loss, and a host of many other limitations.[5]

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[1] KEVIN TRUDEAU, NATURAL CURES "THEY" DON'T WANT YOU TO KNOW ABOUT (Alliance Publishing Group, Inc. 2004). All books contain a disclaimer at the beginning where Trudeau seems to candidly announce that he is not a doctor, accountant, or financial planner but a reporter, that the book is for educational or entertainment purposes only, and that dates, names, locations, and actual events have been changed or made up for fun. *See id*; KEVIN TRUDEAU, MORE NATURAL "CURES" REVEALED: PREVIOUSLY CENSORED BRAND NAME PRODUCTS THAT CURE DISEASE vii (Perseus Publishing 2008); KEVIN TRUDEAU, THE WEIGHT LOSS CURE "THEY" DON'T WANT YOU TO KNOW ABOUT ix (Alliance Publishing Group, Inc. 2009); KEVIN TRUDEAU, DEBT CURES "THEY" DON'T WANT YOU TO KNOW ABOUT vii (Equity Press 2009). To get points of emphasis across to his readers, Trudeau litters his books with bold type and scream caps. Thus, not only has his message been criticized but also his writing style. Christopher Dreher, *What Kevin Trudeau Doesn't Want You to Know*, July 29, 2005, http://dir.salon.com/story/books/feature/2005/07/29/trudeau/index.html ("His prose style mimics the gibberish favored by online spam advertisements, he frequently uses SCREAM CAPS to emphasize OBVIOUS POINTS.").

[2] Kevin Trudeau, http://en.wikipedia.org/wiki/Kevin_Trudeau (last visited Oct. 10, 2009) ("Trudeau says that pharmaceutical companies 'don't want us to get well' because curing disease is not nearly as profitable as treating it in perpetuity.").

[3] Copeland, *infra* note 7.

His *Weight Loss Cure* book and accompanying infomercials were not the first time Trudeau, who never attended college or medical school, peddled miracle cures to the unwitting public. This convicted felon[6] "has been remarkably successful doing infomercials for everything from how to achieve a photographic memory to how to cure your addictions to how to beat cancer by ingesting a particular type of calcium that, as fate would have it, he also happened to sell."[7] In fact, he is so slick that he could sell you the shirt off of your own back, and you would walk away beaming over the great deal you just got.[8] Trudeau's fortune, of which the exact amount is unknown, has been made by selling modern snake oil that has been swallowed by millions.

I. THE MAN BEHIND THE INFOMERCIAL

Born February 6, 1963 and adopted by Robert and Mary Trudeau of Lynn, Massachusetts, Kevin Trudeau showed an early drive for monetary success by working odd jobs as a youth, often at the expense of his studies.[9] Trudeau's charm and success were noticed at an early age by his peers who voted him "Most Likely to Succeed" during his senior year.[10] "[B]y the age of twenty or [twenty-one he] was more successful than he had ever imagined."[11] The man who would become a controversial infomercial star was never one to compartmentalize his business ventures; he has been featured in infomercials, written quack books that sell like hotcakes, and founded the international pool tournament for which he could not pay the prize money.[12] However, as Trudeau quickly climbed the ladder of success, his legal woes were just beginning.

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[4] KEVIN TRUDEAU, THE WEIGHT LOSS CURE "THEY" DON'T WANT YOU TO KNOW ABOUT 43-44 (Alliance Publishing Group, Inc. 2007) (discussing Dr. Simeons's manuscript *Pounds and Inches: A New Approach to Obesity*).

[5] WEIGHT LOSS CURE, *supra* note 1, at 73-114.

[6] Kevin Trudeau, *supra* note 2.

[7] Libby Copeland, *Wait, There's More*, WASH. POST, Oct. 23, 2005, at D1.

[8] *Id.*

[9] Letter from Daniel W. Schwartz, M.D., Diplomate, American Board of Forensic Psychiatry, to Berry M. Fallick, esq. (Apr. 7, 1991) (on file with author) (discussing Trudeau's family history and early work history ranging from newspaper boy to professional magician). "He was driven to keep proving himself, as a way of counteracting the criticisms he had sustained from his adoptive parents, teachers and friends, and the feeling that he had been abandoned by his real mother." *Id.*

[10] Kevin Trudeau, *supra* note 2.

In 1990, Trudeau was convicted of grand larceny for which he served ten days of a twenty-one day sentence.[13] Trudeau explained that he had "inadvertently" withdrawn eighty thousand dollars from an account in Massachusetts based on checks that he had deposited but had not cleared.[14] He claimed this was because his secretary embezzled the money, but others, including the criminal justice system, simply called this check kiting.[15] To make his scheme seem more legitimate, he even posed as a doctor, but Trudeau claims the doctor title was a silly misunderstanding because he jokingly referred to himself as a "doctor in memory" when he "inadvertently" withdrew the money from the bank.[16]

Only one year later, Trudeau was desperate for assets to fund and operate his American Memory Institute, so he tried a little credit card fraud on for size.[17] He obtained and fraudulently used, to the tune of $122,735.68, eleven credit cards for which he served two years in federal prison.[18] He explained his actions by saying "because he paid a bill late, which led to American Express giving him a bad credit rating . . . [N]o one would give him a credit card, . . . he had little choice but to apply for cards with fake Social Security numbers."[19] Trudeau's true colors were beginning to show. Dr. Daniel Schwartz's 1991 psychological evaluation shed a little light into Trudeau's nature when he said "Mr. Trudeau's drive to succeed has been so intense that it has on numerous occasions impaired his judgment."[20] Interestingly, the doctor did not characterize the man with the "outgoing personality that should thrive in [a commercial] enterprise" as antisocial or inherently criminal.[21] The Federal Trade Commission, the courts, and many American consumers may have a drastically different view on Kevin Trudeau.

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[11] Letter from Daniel W. Schwartz, *supra* note 9.

[12] Kevin Trudeau, *supra* note 2. The International Pool Tournament in Reno, Nevada was dealt a devastating blow when Trudeau could not pay the prize money. This sent shock waves throughout the pool community. *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Copeland, *supra* note 7.

[17] Letter from Daniel W. Schwartz, *supra* note 9.

[18] Copeland, *supra* note 7. Two of the cards were from purchasers of his Memory System, and nine were obtained with a false social security number. *See* Kevin Trudeau, *supra* note 2.

Trudeau regrouped and tried a third criminal venture in 1996 when he and fellow prison buddy, Jules Leib,[22] were charged with running an illegal pyramid scheme.[23] Within Nutrition for Life, Trudeau Marketing Group created its own distributor agreement that made up the pyramid scheme.[24] For Trudeau Marketing Group, Trudeau and Leib enticed individuals to attend recruitment meetings where they were asked to purchase membership in the "Instant Executive Program," which made its money not from products sold but from members recruited.[25] Former president of Nutrition for Life, David Bertrand, called Trudeau "brilliant" and "'one of the best salespeople [he] has ever known'" because he "could sell [anything] because he seemed to really believe in what he was saying . . . but he repeatedly took it too far."[26]

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[19] Copeland, *supra* note 7. Showing little, if any, remorse for his crimes, Trudeau said "'[y]'know, I've been focused on making money and what I did was wrong -- even though it wasn't a heinous crime and I could justify it nine different ways.'" *Id.*

[20] Letter from Daniel W. Schwartz, *supra* note 9. Trudeau's intellectual brilliance is driven by a "subconscious urge to succeed." *Id.*

[21] *Id.*

[22] Copeland, *supra* note 7. Jules Leib and Trudeau met in prison on the West Coast where Leib was serving time for attempted distribution of cocaine. *Id.*

[23] An illegal pyramid scheme is a marketing scheme based primarily on the recruitment of new members rather than the sale of products. "Pyramids are illegal across the country because they are mathematically doomed to fall apart. Those who enter the pyramid last always lose money." *Ryan's Sweeping Settlement with Trudeau Protects Consumers & Nets $185,000 for Eight States*, http://libocceclub.com/nfliagmt.html (last visited Oct. 16, 2009).

[24] Nutrition for Life is a multi-level marketing company where salespeople earn money off of the sales made in addition to getting a percentage of the sales made by distributors they recruit. *Id.* The company was not a defendant in any lawsuit but entered into negotiations voluntarily. *Id.*

[25] *Ryan's Sweeping Settlement with Trudeau Protects Consumers & Nets $185,000 for Eight States*, *supra* note 23. The program required members to buy $1000 worth of products, a $35 start-up kit, and $135 worth of products each month. *Id.*

Here Trudeau began mastering how to promise without performing. Bertrand learned that "Trudeau had promised free trips to entice people to sign up as distributors," but the trips never materialized and understandingly people complained, so Nutrition for Life bailed Trudeau out by funding a weekend cruise for thousands of people.[27]

The state of Illinois sued Trudeau and Leib for the illegal pyramid scheme, and the two men settled the charges by paying $185,000 to eight states.[28] Trudeau later explained his past transgressions by saying that he was caught up in the fast life of making money.[29] But perhaps he is still there.

II. LET THE GAMES . . . LITIGATION BEGIN

Trudeau had gotten a taste of scamming America that would whet his appetite for more. Since he has said "greed supersedes everything,"[30] Trudeau turned his efforts from the criminal world to infomercials and tapped into abundant wealth first through peddling fraudulent products, then hiding behind the First Amendment[31] by writing quack self-help style books. As Alex Jones so eloquently observed, Americans have a "right to buy crap," and "Trudeau has the right to sell, write, and say anything."[32]

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[26] Copeland, *supra* note 7.

[27] *Id.* Bertrand defended Trudeau by saying that "[a]t the time he made the promise he fully intended to comply, . . . [h]e always intends to but he kind of gets carried away in his exuberance.'" *Id.*

[28] The states were Illinois, Hawaii, Idaho, Kentucky, New Jersey, Michigan, Missouri, and Pennsylvania. One hundred twenty five thousand dollars of the total amount was paid to Illinois alone. *Ryan's Sweeping Settlement with Trudeau Protects Consumers & Nets $185,000 for Eight States*, *supra* note 23.

[29] Copeland, *supra* note 7.

[30] Interview by Alex Jones with Kevin Trudeau, Author of *The Weight Loss Cure "They" Don't Want You to Know About* (May 26, 2009).

[31] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

[32] Interview by Alex Jones with Kevin Trudeau, *supra* note 30.

A. Federal Trade Commission

The Federal Trade Commission (FTC) has a drastically different view from Alex Jones. The FTC is responsible for enforc[ing] federal consumer protection laws that prohibit fraud, deception and unfair business practices."[33] Declaring that "unfair or deceptive acts or practices in or affecting commerce . . . are . . . declared unlawful," the FTC targets advertisements for food, drugs, devices, services, or cosmetics.[34] "An advertisement is false if it is 'misleading in a material respect.'"[35] This simply means, according to the FTC's Policy Statement on Deception, that "a material misrepresentation 'involves information that is important to consumers and, hence, likely to mislead them and, hence, likely to affect their choice of, or conduct regarding, a product.'"[36]

The FTC has unsuccessfully attempted to stop Trudeau's fleecing of American consumers through litigation.[37] While the FTC's actions centered on holding Trudeau in contempt of court for various violations of court orders and injunctions, the Mirror Image Doctrine had been used by the FTC in the past to prosecute other violations of false and deceptive trade practices.

The Mirror Image Doctrine was established in 1971 and was dropped from the books in May 2009, perhaps in response to the West Virginia Law Review article by Keith R. Fentonmiller[38] or perhaps in response to Kevin Trudeau. The FTC's given reason for the removal of the doctrine is akin to bureaucratic housekeeping in that the Mirror Image Doctrine was unnecessary given Supreme Court decisions applying the First Amendment to truthful and non-deceptive advertising.[39] The Mirror Image Doctrine which protected advertisements that in essence mirrored the product advertised read:

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[33] Keith R. Fentonmiller, *Reflection on the Mirror Image Doctrine: Should the Federal Trade Commission Regulate False Advertising for Books Promising Wealth, Weight Loss, and Miraculous Cures?*, 110 W. VA. L. REV. 573, 574 (2008). *See* 15 U.S.C. § 41-58 (2006).

[34] 15 U.S.C. §§ 45(a)(1), 52(a)(9).

[35] Fentonmiller, *supra* note 33, at 574.

[36] *Id.* (quoting *In re* Cliffdale Assoc., Inc., 103 F.T.C. 110, 165 (app.) (1984)).

[37] *See, e.g.*, FTC v. Trudeau, FTC File No. 942 3278 (N.D. Ill. Jan. 12, 1998), *available at* http://www.ftc.gov/os/caselist/kevintrudeau.shtm; *see also* FTC v. Trudeau, No. 98 Civ. 0168 (N.D. Ill. Sept. 7, 2004); FTC v. Trudeau, 567 F. Supp. 2d 1016 (N.D. Ill. 2007); FTC v. Trudeau, 572 F. Supp. 2d 919 (N.D. Ill. 2008); Supplemental Order and Judgment, FTC v. Trudeau, No. 03 Civ. 3904 (N.D. Ill. Nov. 4, 2008); FTC v. Trudeau, No. 08-4249, 2009 WL 2615822 (7th Cir. Aug. 27, 2009). *See generally* Federal Trade Commission, A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority, http://www.ftc.gov/ogc/brfovrvw.shtm (discussing the FTC's administrative and judicial enforcement authority).

[38] Fentonmiller, *supra* note 33, at 573.

> The Commission, as a matter of policy, ordinarily will not proceed against advertising claims which promote the sale of books and other publications: Provided, The advertising only purports to express the opinion of the author or to quote the contents of the publication; the advertising discloses the source of statements quoted or derived from the contents of the publication...Whether the advice being offered by the publication will achieve, in fact, the results claimed for it in the advertising will not be controlling if appropriate disclosure have been made. This policy does not apply, however, if the publication, or its advertising, is used to promote the sale of some other product as part of a commercial scheme.[40]

Fentonmiller, an FTC staff attorney, argued that the Mirror Image Doctrine represented a "significant loophole" that hampered the agency's efforts to clean up deceptive advertising.[41] Because of the gaping hole, an author could meet the minimal requirements of the FTC's Mirror Image Doctrine and still sell legally bogus material to the unsuspecting consumer. Trudeau jumped through the loophole with both feet because the Mirror Image Doctrine held advertisers liable for false advertising only if the advertisement misrepresented the content of the book, not if the advertising claims themselves, which fully mirror the book, were unsubstantiated.

With the faulty Mirror Image Doctrine off the books, the FTC has little, if anything left in its bag of tricks with which to hold advertisers like Trudeau liable for their conduct. Therefore, the FTC has little option but to go after the advertisers' pocketbooks, but thus far, nothing has put even a dent into Trudeau's massive and elusive fortune.[42] Trudeau even said "freezing [his] assets will not do anything," and "thirty-seven million dollars will not break me or change my lifestyle."[43] Every time the FTC tries to stop Trudeau, he slips in between the gaps in the law to trot off into the sunset with his bags of money in hand smirking as he tauntingly yells over his shoulder, "catch me if you can."

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[39] Gary D. Hailey & Jeffrey D. Knowles, *Legal Review: The FTC 'Disappears' Its Mirror Image Doctrine*, RESPONSE MAGAZINE, May 1, 2009, http://www.responsemagazine.com/resources/legal-resources/legal-review-the-ftc-039disappears039-its-mirror-image-doctr-1379.

[40] Advertising in Books, Enforcement Policy, 36 Fed. Reg. 13414 (Jul. 21, 1971).

[41] Hailey and Knowles, *supra* note 39.

B. Infomercials in 1998

Imagine a simple colon cleanse that will rid your body of toxins which cause fatigue, headaches, depression, arthritis, and other ailments. What about the cure for baldness? Wouldn't a cure for all addictions from smoking to heroin be wonderful? Would you like a photographic memory or like to become a mega reader? In 1998, Trudeau was featured in several infomercials peddling products which he alleged did all of these things and more.[44] In its suit against Trudeau, the FTC alleged that, through the infomercials, he violated 15 U.S.C. § 45 (a) by using false and misleading advertising which "constitute[d] deceptive acts or practices in or affecting commerce."[45] Additionally, nowhere in the infomercials that were thirty minute segments devoted to the promotion of a particular product did Trudeau ever disclose that the segment was a paid advertisement. According to the FTC's complaint, this constituted a violation of 15 U.S.C. § 45(a) as well because the format was deceptive.[46] The action seeking both preliminary and permanent injunctions never went forward because Trudeau settled.[47]

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[42] In his interview with Alex Jones, Trudeau brags about companies and assets around the world that the FTC cannot touch. Interview by Alex Jones with Kevin Trudeau, *supra* note 30.

[43] *Id.* (referencing *FTC v. Trudeau*, No. 03 Civ. 3904 (N.D. Ill. Nov. 4, 2008)), *available at* http://www.ftc.gov/os/1998/01/trudeau.cmp.htm (supplemental order and judgment which granted the FTC a $37.6 million contempt verdict against Trudeau)).

[44] *See generally* Complaint, FTC v. Trudeau, FTC File No. 942 3278 (N.D. Ill. Jan. 12, 1998), *available at* http://www.ftc.gov/os/1998/01/trudeau.cmp.htm (discussing the infomercials for Eden's Secret Nature's Purifying Product, Sable Hair Faming System, Jeanie Eller's Action Reading, Dr. Callahan's Addiction Breaking Technique, Kevin Trudeau's Mega Memory, and Howard Berg's Mega Reading).

[45] *Id.*

[46] *Id.*

In the settlement, Trudeau paid $500,000 in consumer redress; established a performance bond of $500,000; was barred from making false claims about any product in the future; was barred from misrepresenting the existence, contents validity, results, conclusions or interpretations of any test, study or research; required to have substantiation, which when appropriate could be scientific, for claims concerning the benefits, performance or efficacy of any product or program he advertised, promoted, sold or distributed; and required to use the following disclosure: "THE PROGRAM YOU ARE WATCHING IS A PAID ADVERTISMENT FOR [THE PRODUCT OF SERVICE]" in TV and radio advertisement of a certain length.[48] Trudeau's half a million dollar settlement contributed to almost one half of the total settlement of $1.1 million dollars.[49] While monetarily small this settlement proved to be the driving force behind all future actions against Trudeau. However, in this litigious game of cat and mouse that would go on between the FTC and Trudeau for over a decade, Trudeau managed to stay just one step ahead.

C. Coral Calcium and Biotape in 2003

In 2003, Trudeau again tried his hand at the infomercial market by advertising Coral Calcium and biotape. Coral Calcium was a product that allegedly could cure cancer, multiple sclerosis, heart disease, lupus, and chronic high blood pressure, just to name a few. The FTC challenged that "these and other claims go far beyond existing scientific evidence regarding the recognized health benefits of calcium."[50] In the infomercials for Coral Calcium, Trudeau, along with Robert Barefoot, who was called Dr. Barefoot in the infomercials despite not having a medical or doctoral degree,[51] raved about the benefits of the "supplement purportedly comprised of marine coral from Okinawa, Japan," and the price was a steal at ninety capsules, the equivalent of a one month supply, for a mere $19.95.[52] Biotape was a "purported pain-relief product"[53] that sold in strips of ten for meager $10 a package. The user simply placed the adhesive tape wherever pain occurs and should feel relief for "debilitating back pain, and pain from arthritis, sciatica, and migraines."[54]

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[47] Individual actions were also filed against other participants in the infomercials and product developers: Mega Systems International, Inc. (infomercial producer), Jeffrey Salberg (infomercial producer), Kenneth Wright (Eden's Secret), Roger J. Callahan (Addiction Breaking), Jeanie Eller (Action Reading), Howard Berg (Mega Reading), Tru-Vantage, and Jacqueline Sable (Hair Farming). All of the above, except Jacqueline Sable, settled their individual FTC actions out of court. *See* http://www.ftc.gov (last visited Nov. 16, 2009).

[48] FTC v. Trudeau, FTC File No. 942 3278 (N.D. Ill. Jan. 12, 1998) (Stipulated Order for Permanent Injunction and Final Judgment Against Kevin Trudeau) (on file with author), *available at* http://www.ftc.gov/os/1998/01/trudeau.ord.htm; Press Release, Federal Trade Commission, Infomercial Marketers Settle Various Charges: Ad Claims for "Hair Farming," "Mega Memory System," "Addiction Breaking System," "Action Reading," " Eden's Secret," and "Mega Reading" Were Deceptive (Jan. 13, 2008) (on file with author), *available at* http://www.ftc.gov/opa/1998/01/megasyst.shtm.

[49] Press Release, Infomercial Marketers, *supra* note 48.

The FTC took action against Trudeau individually and against others involved in the marketing or sales of either product.[55] Charging Trudeau with violating the 1998 order by making unsubstantiated claims about both products, the FTC sought a finding of contempt as well as monetary and injunctive relief.[56] The FTC was essentially petitioning the court for the same redress sought in 1998. The 1998 order did not work in preventing the Coral Calcium or Biotape infomercials, so why would the same penalties in 2003 prevent Trudeau from future misconduct? However, the FTC trudged onward with its action.

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[50] Press Release, Federal Trade Commission, FTC and FDA Take New Actions in Fight against Deceptive Marketing: FTC Charges Marketers of Coral Calcium Supreme Dietary Supplement and a Pain-Relief Product with Making False and Unsubstantiated Claims (June 10, 2003) (on file with author), *available at* http://www.ftc.gov/opa/2003/06/trudeau.shtm.

[51] Stephen Barrett, M.D., Be *Wary of Coral Calcium and Robert Barefoot*, Quackwatch, Jan. 25, 2004, http://www.quackwatch.org/01QuackeryRelatedTopics/DSH/coral.html (discussing Barefoot's dubious claims and questionable credentials, Coral Calcium's cost considerations and safety considerations, and government action).

[52] *See supra* note 50 and accompanying text.

[53] *Id.*

[54] Press Release, Federal Trade Commission, Kevin Trudeau Banned from Infomercials: Trudeau Settles Claims in Connection with Coral Calcium Supreme and Biotape (Sept. 7, 2004) (on file with author), *available at* http://www.ftc.gov/opa/2004/09/trudeaucoral.shtm.

[55] This paper will focus on the action against Trudeau, but for information on the suit against Kevin Trudeau, Shop America (USA), LLC, Shop America Marketing Group, LLC, Trustar Global Media, Limited, Robert Barefoot, Deonna Enterprises, Inc., and Karbo Enterprises Inc. see *FTC v. Trudeau*, No. 03 Civ. 3904 (N.D. Ill. Sept. 7, 2004) which settled six months before Trudeau's individual action.

[56] Press Release, FTC and FDA Take New Actions, *supra* note 50. In addition to claiming that Coral Calcium cured cancer and other diseases, Trudeau and Barefoot falsely claimed to cite published studies from reputable medical journals supporting their claims. Coral Calcium, they claimed, provided the same amount of bioavailable calcium as two gallons of milk, and that the body absorbs significantly more of the cal-

"In July 2003, Trudeau entered into a stipulated preliminary injunction that prohibited him from continuing to make the challenged claims for Coral Calcium Supreme and Biotape."[57] Showing little regard for the court, Trudeau disseminated a direct mail piece saying that "the Federal Trade Commission forbids us from saying that Calcium prevents, or even possibly even cures cancer, heart disease, diabetes, and pain - - even if its [sic] true. . . . but, whatever it does, it only takes about 3-6 months before most people start to feel the difference in their own health."[58] The letter was mailed to more than 350,000 consumers and netted an additional two million for Trudeau.[59] The court held Trudeau in contempt for violating the

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cium in Coral Calcium, up to one hundred times more, and at a significantly faster rate. *Id.*

[57] Press Release, Kevin Trudeau Banned, *supra* note 54.

[58] Memorandum in Support of Plaintiff's Motion to Find Defendant Kevin Trudeau & Third Party Trustar Marketing Corp. in Civil Contempt for Violating the Preliminary Injunction at 1, FTC v. Trudeau, No. 98 Civ. 0168, 2004 WL 3722527 (N.D. Ill. June 7, 2004) (No. 03-3904) [hereinafter Civil Contempt Memorandum]. Additionally, Trudeau violated the preliminary injunction by airing the Whistle Blower Infomercial which advertised his book, *Natural Cures "They" Don't Want You to Know About*. In the infomercial Trudeau claimed "that there are specific branded products that are effective in treating and curing diseases such as cancer, heart disease, diabetes, multiple sclerosis, diabetes [sic], Attention Deficit Disorder ("ADD"), and acid reflux disease" in violation of the preliminary injunction which enjoined him from making representations either expressly or implicitly that any product can "prevent, treat, or cure any disease unless at the time the representation is made, he relied upon reasonable and competent scientific evidence. *Id* at 6. Trudeau responded by saying "[b]ecause the . . . Whistleblower infomercial was for a book, and was not used as vehicle . . . to sell Coral Calcium or any other product, it is fully protected by the Preliminary Injunction's carve-out for Mr. Trudeau's First Amendment rights." *Id.* at 8-9. Also, a very messy analysis intertwining commercial speech and the Mirror Image Doctrine first emerged in Trudeau's Response Brief. [author should elaborate on this analysis] Response of Defendant Kevin Trudeau & Third-Party Trustar Marketing Corp. to Motion for Civil Contempt for Violating the Preliminary Injunction at 8-9, FTC v. Trudeau, No. 98 Civ. 0168, 2004 WL 3722530 (N.D. Ill. 2004) (No. 03-3904). After Trudeau's June 29, 2004 response, this argument is dropped from both sides and does not seem to factor into the court's contempt holding.

[59] Supplemental Memorandum in Support of Plaintiff's Motion to Find Defendant Kevin Trudeau & Third Party Trustar Marketing Corp. in Civil Contempt for Violating the Preliminary Injunction, FTC v. Trudeau, No. 98 Civ. 0168, 2004 WL 3722527 (N.D. Ill. June 29, 2004); Press Release, Kevin Trudeau Banned, *supra* note 54.

preliminary injunction through the dissemination of the letter and ordered him to cease all marketing for Coral Calcium products.[60]

With one contempt violation under his belt, Trudeau's case continued for a mere six months before it settled out of court. Trudeau agreed to pay two million dollars in consumer redress[61] and was banned from "appearing in, producing, or disseminating future infomercials that advertise any type of product, service, or program to the public, except for truthful infomercials for informational publications."[62] The FTC hailed this broad ban as a victory, but for Trudeau, the agreement would prove to be his ace in the hole.

D. The Press Release and Following Actions

As is custom after settlement, the FTC issued a press release on September 7, 2004 which was posted on its website to inform the public about the status of the suit against Trudeau individually.[63] In bold type across the top of the article the headline read: "Kevin Trudeau Banned from Infomercials."[64] Under the bold headline, a slightly smaller yet larger than the text of the press release and still bolded sub-headline read: "Trudeau Settles Claims in Connection with Coral Calcium Supreme and Biotape."[65] The text of the press release described the terms of the settlement and the FTC's claims against Trudeau.[66] Additionally, Lydia Parnes, Acting Director of the FTC's Bureau of Consumer Protection, was quoted saying "'[t]his ban is meant to shut down an infomercial empire that has misled American consumers for years' . . . . 'Other habitual false advertisers should take a lesson; mend your ways or face serious consequences.'"[67] Towards the bottom of the press release, under the bolded heading "note," the following appeared "[t]his stipulated final order is for settlement purposes only and does not constitute an admission by the defendants of a law violation."[68]

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[60] Press Release, Kevin Trudeau Banned, *supra* note 54.

[61] Trudeau paid $500,000 in cash and transferred his residential property in Ojai, California and his 2003 Mercedes Benz SL55/6 to pay the total two million dollar settlement. Also, a twenty million dollar avalanche clause was included and would be used if Trudeau misrepresented the state of his monetary affairs. Press Release, Kevin Trudeau Banned, *supra* note 54.

[62] *Id.* Additionally, Trudeau could not "make disease or health benefits claims for any type of product, service, or program in any advertising, including print, radio, Internet, television, and direct mail solicitations, regardless of the format and duration." *Id.*

[63] Press Release, Kevin Trudeau Banned, *supra* note 54

[64] *Id.*

[65] *Id.*

[66] *See supra* notes 61-62 and accompanying text.

To counter the FTC, Trudeau answered the press release with two lawsuits, *Trudeau v. FTC*[69] and *Trudeau v. United States*[70] after first requesting the FTC to withdraw the press release.[71]

In *Trudeau v. United States*, Trudeau alleged "that the press release indicated that the district court had found him liable for wrongdoing" and characterized him as a "habitual false advertiser" in the eyes of the public.[72] This claim was ultimately dismissed for lack of subject matter jurisdiction.[73]

In *Trudeau v. FTC*, Trudeau, who is Mr. Misleading, alleged that the FTC's press release was "false and misleading, and that in issuing it, the FTC exceeded its statutory authority and violated his First Amendment rights."[74] Touché Trudeau. The false and misleading argument Trudeau raised argued that the 2004 Final Order "[1] falsely state[ed] that Trudeau had been banned entirely from infomercials, [2] erroneously impl[ied] that the settlement was a judicial finding that Trudeau was a habitual false advertiser, [3] falsely impl[ied] that the $2 million was a fine, and [4] conspicuously omit[ted] that fact that there [had] been no finding of false advertising."[75]

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[67] Press Release, Kevin Trudeau Banned, *supra* note 54.

[68] *Id.* Also, the Stipulated Preliminary Injunction said:

> Defendants . . . expressly deny any wrongdoing or liability for any of the matters alleged in the Complaint and the civil contempt action. There have been no findings or admissions of wrongdoing or liability by the Defendants . . . other than the finding against Kevin Trudeau for contempt of Part I of the Stipulated Preliminary Injunction, entered by the Court on June 29, 2004.

Stipulated Final Order for Permanent Injunction and Settlement of Claims for Monetary Relief as to Defendants Kevin Trudeau, Shop America (USA), LLC, Shop America Marketing Group, LLC, Trustar Global Media, Limited and Relief Defendants K.T. Corp, Limited, and Trucom, LLC at 3, FTC v. Trudeau, No. 98 Civ. 0168 (N.D. Ill. 2004) (No. 03-3904), *available at* http://www.ftc.gov/os/caselist/0323064/040907/stip0323064.pdf. (Stipulated Final Order for Permanent Injunction and Settlement of Claims for Monetary Relief as to Defendants Kevin Trudeau, Shop America (USA), LLC, Shop America Marketing Group, LLC, Trustar Global Medial, Limited and Relief Defendants K.T. Corp. Limited, and Trucom, LLC).

[69] 456 F.3d 178 (D.C. Cir. 2006).

[70] 68 Fed. Cl. 121 (2005).

[71] *Id.* at 125. The request was made on February 16, 2005; the FTC denied Trudeau's request on February 22, 2005, and the Federal Claims Court lawsuit was filed on February 28, 2005. *Id.* at 125-26.

[72] *Id.*

[73] *Id.* at 131. Trudeau sought to characterize the Stipulated Order as a contract. *Id* at 126. The court found that the government was acting in its sovereign capacity; however, "the purported contract between Mr. Trudeau and the United States [did] not 'clearly and unmistakably' provide that the United States [was] liable for monetary damages in the event of breach." *Id.* at 130-31.

The court found that there was jurisdiction[76]; however, Trudeau's complaint was legally insufficient in that it stated no claim upon which relief could be granted.[77] The court reviewed each one of the four arguments above and struck them down in turn. First, the word "ban" did not mislead a reader into thinking that the settlement was a total ban because of the inclusion of "except for truthful infomercials for informational publications."[78] Second, the quote from the Acting Director Parnes could not lead a reasonable reader to the conclusion that the court found Trudeau to be a false advertiser because of the context of the quote as well as the note at the bottom of the press release.[79] Third, nowhere were the two million dollars characterized as a fine, and the press release made it clear that the fund was part of a voluntary settlement.[80] Finally, the press release was not misleading because it did not state that there had been "no findings or admissions of wrongdoing or liability with respect to Trudeau;" the link to the Final Order was just one mouse click away and readily available for the public to view and compare.[81] Therefore, in agreement with the district court, the appellate court found "that 'the differences between the press release and the stipulated order [were] minor and illusory.'"[82]

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[74] Trudeau v. FTC, 456 F.3d 178, 180 (D.C. Cir. 2006).

[75] *Id.* at 194 (alterations in original).

[76] *Id.* at 187.

[77] *Id.* at 191 (quoting Press Release, Kevin Trudeau Banned, *supra* note 53).

[78] *Id.* at 194-95.

[79] *Id.* at 195-96.

[80] *Id.* at 196.

[81] *Id.* at 196-97.

[82] *Id.* at 197 (quoting Trudeau v. FTC, 384 F. Supp. 2d 281, 296 (D.D.C. 2005)).

III. THE BOOKS

Trudeau's most controversial two books are *Natural Cures "They" Don't Want You to Know About* and *The Weight Loss Cure "They" Don't Want You to Know About*; each book has been the center of litigation almost as soon as they were advertised.[83]

Natural Cures was published in 2004 by Trudeau's own publishing company. Debuting his theory that drug companies, doctors and the government want to keep Americans sick, Trudeau explained that you catch an illness because you have too many toxins in your body, and the most toxic things one can ingest are prescription and nonprescription drugs.[84] Later Trudeau "exposes" the food industry that, he alleges, is putting "secret poisonous chemicals" into America's food.[85] Why, a shocked reader may ask? Well, "it's all about the money."[86] Perhaps that is Trudeau's personal motto, and he is just confused, but back to the book.

Trudeau explains how to never get sick again. For example, if someone never wants to be sick again he should take out all metal dental work,[87] get fifteen colonics in thirty days,[88] not eat any food produced by or sold by a publicly traded corporation or anything that is a brand name product,[89] not eat anything that comes out of a microwave oven, [90] and follow the 121 other requirements listed by Trudeau.[91] In his Frequently Asked Questions chapter, Trudeau answers the question of what to do if a doctor advises surgery by encouraging the reader to "stop going to medical doctors who prescribe drugs and surgery."[92] Later he adds, "I believe that any person who says that you 'need' drugs and surgery is misinformed, unknowledgeable about natural methods, or simply trying to make money off of you."[93] Where are all of the natural cures amidst the ranting about drug and food companies and toxins? Out of the 522 total pages, one chapter which is comprised of a mere seventeen pages is dedicated to combating specific illnesses with natural remedies.[94]

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[83] NATURAL CURES, *supra* note 1; WEIGHT LOSS CURES, *supra* note 1.

[84] NATURAL CURES, *supra* note 1, at 73.

[85] *Id.* at 86.

[86] *Id.* at 85.

[87] *Id.* at 143.

[88] *Id.* at 135.

[89] *Id.* at 142 (explaining that over fifteen thousand chemicals are put into foods and are not required to be on the label and that the food industry has lobbied Congress for the right to put low fat, fat free, sugar free, light, etc. on almost anything).

[90] *Id.* at 145 (explaining that "[e]ating microwaved food on a regular basis . . . weakens your immune system and causes depression and anxiety" and baby formula is poison).

[91] *See id.* at 115-78.

[92] *Id.* at 294.

When asked for the proof of the natural cures, Trudeau says his studies are unpublished, or he does not believe in studies, or the studies are in the book, but none can ever be found.[95] They were never there.

In 2005, Trudeau spent over twenty million dollars buying over two thousand minutes of air time for his infomercials for his *Natural Cures* book which has been called ten percent common sense and ninety percent quackery.[96] Additionally the book refers the reader to a website[97] where the reader may purchase a membership to view more natural cures.[98] A follow up book, *More Natural "Cures" Revealed: Previously Censored Brand Name Products That Cure Disease*, was released in 2006 following backlash that his *Natural Cures* book did not contain cures.[99]

His second published controversial book, which some may say is the most controversial, is the *Weight Loss Cure*. It was published in 2007 by, again, Trudeau's publishing company.[100] In the book, Trudeau describes a four-phase, multi-month plan originally derived from British Endocrinologist Dr. A.T.W. Simeons in the 1950's.[101] Before launching into the cure on page seventy three of the book, Trudeau lists thirty-one reasons why people became overweight, but Trudeau says that people continue to be overweight because of an abnormal hypothalamus gland.[102] His diet plan, he alleges, will reset the hypothalamus and cause a person to never gain the weight back no matter what they eat.[103] However, there are many caveats. Phase one is optional; however, Trudeau implies that for optimum success one must follow phase one, which calls for fifteen colonics in thirty days, strict eating requirements, taking Coral Calcium, and avoiding the microwave, just to name a few from his list of sixty requirements.[104] Getting flustered? Remember this is only phase one. He says the "list may seem overwhelming. Certainly the average person may find it difficult to do everything on this list for the entire thirty-day Phase 1 period."[105] In phase two, the dieter adds to the phase one regiment injections of hCG, human choriocic gonadotrophin.[106] The hormone, hCG, is available in the United States by prescription only and is not approved by the FDA for weight loss.[107] Trudeau suggests a clever way around this pesky little problem: go to Europe, have a doctor there write you a prescription, stock up on hCG, and transport it back to the America.[108] Additionally the dieter may eat only five hundred calories a day for the twenty-one to forty-five days of phase two.[109] Phase three lasts for twenty-one days, and "you are allowed to eat as much food and any type of food you choose" with a few minor exceptions: no sugar, no starch, no artificial sweeteners, no fast food, no nitrates, no trans fat, no ice cold drinks, and the list goes on.[110] Phases two and three must be followed "exactly as described."[111] Finally, phase four is the rest of the dieter's life.[112] "The simplest rule to follow is to eat anything you want, as much as you want, as often as you want. The only caveat is only eat 100% organic food."[113]

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[93] *Id.*

[94] *See id.* at 341-58.

[95] Copeland, *supra* note 7; John Stossell, Glen Rupel & Frank Mastropolo, *King Con -- Selling Questionable Cures? Bestselling Author Selling Questionable Cures to the Desperate and Gullible*, ABC NEWS 20/20, Jan. 20, 2006, http://abcnews.go.com/2020/Health/story?id=1527774 (discussing the University of Calgary study that found a fictitious cure for diabetes).

[96] Stossell, Rupel, & Mastropolo, *supra* note 95.

[97] The website is www.naturalcures.com.

[98] Stossell, Rupel, & Mastropolo, *supra* note 95. The memberships are $9.95 for a month or $499 for a lifetime. *Id.*

[99] KEVIN TRUDEAU, MORE NATURAL "CURES" REVEALED: PREVIOUSLY CENSORED BRAND NAME PRODUCTS THAT CURE DISEASE (2006); *See generally* Trudeau v. New York State Consumer Protection Board, Civ. No. 1:05-CV-1019, 2006 WL 1229018 (N.D.N.Y. 2006). The CPB sent out a press release accusing Trudeau of fraud after two complaints about the book were made, so Trudeau obtained an injunction and sent a corrective letter. *Id.* at 3. The suit was later dismissed on grounds of Eleventh Amendment immunity. *Id.* Trudeau was later awarded over one hundred thousand dollars in attorney's fees. Trudeau v. Bockstein, No. 05-cv-1019, 2008 WL 3413903 (N.D.N.Y. 2008).

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[100] KEVIN TRUDEAU, THE WEIGHT LOSS CURE "THEY" DON'T WANT YOU TO KNOW ABOUT (2007).

[101] Kevin Trudeau, *supra* note 2.

[102] *See* WEIGHT LOSS CURE, *supra* note 1, at 17-26 (listing genetics, lack of walking, lack of sleep, hormonal imbalances, cold water drinks and a list of other things as reasons for obesity). The hypothalamus is a part of the brain that controls body temperature, hunger, thirst and other functions. Hypothalamus, http://en.wikipedia.org/wiki/Hypothalamus (last visited Nov. 18, 2009).

[103] Press Release, Federal Trade Commission, FTC: Marketer Kevin Trudeau Violated Prior Court Order: Charges Him with Misrepresenting Contents of Book (Sept. 14, 2007) (on file with author), *available at* http://www.ftc.gov/opa/2007/09/trudeau.shtm.

[104] MORE NATURAL CURES, *supra* note 1, at 76-92.

[105] *Id.* at 91.

[106] *Id.* at 93.

[107] *Id.* at 116.

[108] *Id.* at 116-17.

Trudeau's extensive and exhaustive weight loss plan is made even more troubling by the fact that none of the restrictions were described in his infomercials promoting the book. He said "it's easy to do, you can do it at home."[114] He must have forgotten about the colonics that must be done with a doctor's supervision or the hCG injections that are not available in the United States. He also said "[a]nd when you're done with the protocol, eat whatever you want and you don't gain the weight back. No restrictions now."[115] He never mentioned the 100% organic part.

IV. THE MAIN EVENT

The FTC perked up once again when Trudeau touted his *Weight Loss Cure* book on late night infomercials. In 2007, the FTC charged Trudeau with "violating a court order by allegedly misrepresenting the contents of his book, *The Weight Loss Cure "They" Don't Want You to Know About*, in several infomercials."[116] Trudeau's response was classic conspiracy theorist. Now, Trudeau was even more outspoken and paranoid saying that the federal government wanted to suppress the free flow of information and does this through intimidation.[117] But the federal government in the broadest sense was not his true target. He spoke against his arch nemesis, the FTC, by claiming that the FTC was attacking authors because they do not like what you have to say in your book, or the FTC protects the profits of companies that contribute money to campaigns, or the FTC was trying to deny his First Amendment rights.[118] Both the FTC and Trudeau were primed for another legal knockabout.

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[109] *Id.* at 96.

[110] *Id.* at 99-105.

[111] *Id.* at 117.

[112] *Id.* at 105.

[113] *Id.* at 106.

[114] Press Release, Marketer Kevin Trudeau, *supra* note 103.

[115] *Id.*

[116] *Id.*

A. Contempt in 2007

In *FTC v. Trudeau*,[119] the FTC charged Trudeau with violating the 2004 order that banned Trudeau from using infomercials to sell any product, service, or program with the narrow exception for books and other publications. [120] In the 2004 order, Trudeau agreed to not misrepresent the content of the book, but the FTC charged that the order was blatantly violated through his infomercial for the *Weight Loss Cure* book.[121]

The FTC sought a third finding of contempt[122] for the infomercial guru whose *Weight Loss Cure* infomercial was one of the top ten most frequently broadcast infomercials in February, March and July 2007. [123]

Trudeau attempted to turn the FTC's charges into "an unprecedented legal assault on advertising for a book . . . ."[124] He argued first that the infomercials and books were not misleading because "[t]he terms 'easy,' 'easiest,' 'easier' and 'easily' or their synonyms appear at least 31 times in the book . . . ."[125] He also argued that the FTC should not have charged him with any wrongdoing because he adhered to the Mirror Image Doctrine.[126] Finally, Trudeau argued that the statements were mere puffery on which "no charge of misrepresentation can be based."[127] He relied on *Carlay Company v. FTC*, where the court found a diet that was advertised as easy to be not misleading. [128] Finally, Trudeau added "no reader, particularly of a 'how-to' book, expects a book advertisement to 'give away' the content of a book to the point where there is nothing left to learn by buying the book."[129]

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[117] Interview with Kevin Trudeau, *supra* note 30.

[118] *Id.*

[119] 567 F. Supp. 2d 1016 (N.D. Ill. 2007).

[120] Press Release, Marketer Kevin Trudeau, *supra* note 103; Plaintiff's Brief Supporting its Motion for Defendant Trudeau to Show Cause Why he Should not be Held in Contempt, FTC v. Trudeau 567 F. Supp. 2d 1016 (N.D. Ill. 2007) (No. 03-C-3904).

[121] Press Release, Marketer Kevin Trudeau, *supra* note 103, *see also supra* notes 111-12 and accompanying text. (discussing what the FTC alleged were misrepresentations); Press Release, Federal Trade Commission, Kevin Trudeau Banned From Infomercial for Three Years, Ordered to Pay More Than $5 Million for False Claims About Weight-Loss Book, (October 6, 2008), *available at* http://www.ftc.gov/opa/2008/10/trudeau.shtm.

[122] Plaintiff's Brief Supporting its Motion for Defendant Trudeau to Show Cause Why he Should not be Held in Contempt at 2 & n.3, FTC v. Trudeau, 567 F. Supp. 2d 1016 (N.D. Ill. 2007) (No. 03-C-3904).

[123] *Id.* at 5.

[124] Preliminary Response of Defendant Kevin Trudeau to Plaintiff's Motion for Defendant Trudeau to Show Cause Why he Should not be Held in Contempt for Violating the 2004 Permanent Injunction, FTC v. Trudeau, 567 F. Supp. 2d 1016 (N.D. Ill. 2007) (No. 1:03CV03904).

Judge Robert W. Gettlemen speaking for the Northern District of Illinois agreed with the FTC in that the court ordered Trudeau not to represent the content of the book, and the word content does not refer to "a few cherry picked phrases."[130] "It refers to the book as a whole, and in this court's opinion, the protocol described in the Weight Loss Book [sic] as a whole is anything but 'easy' under any definition."[131] Thus Trudeau, who "misled thousands of consumers,"[132] was held in contempt.[133]

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[125] Response of Defendant Kevin Trudeau to Plaintiff's Motion for Defendant Trudeau to Show Cause Why he Should not be Held in Contempt for Violating the 2004 Permanent Injunction, FTC v. Trudeau, 567 F. Supp. 2d 1016 (N.D. Ill. 2007) (No. 03-C-3904).

[126] *See supra* part II(a). Trudeau's argument for adherence to the Mirror Image Doctrine later merges with a commercial speech intertwining argument that will be discussed in detail in part V(a). *See infra* part V(a).

[127] Response of Defendant Kevin Trudeau to Plaintiff's Motion for Defendant Trudeau to Show Cause Why he Should not be Held in Contempt for Violating the 2004 Permanent Injunction, FTC v. Trudeau, 567 F. Supp. 2d 1016 (N.D. Ill. 2007) (No. 03-C-3904).

[128] 153 F.2d 493 (7th Cir. 1946) (discussing a diet involving eating one piece of caramel candy to curve a dieter's appetite before a meal).

[129] Response of Defendant Kevin Trudeau to Plaintiff's Motion for Defendant Trudeau to Show Cause Why he Should not be Held in Contempt for Violating the 2004 Permanent Injunction, *supra* note 126, at 12.

[130] FTC v. Trudeau, 567 F. Supp. 2d 1016, 1022 (N.D. Ill. 2007). Judge Gettleman is described as a pro defendant judge, and one who is suspicious of the government, but his fury with Trudeau is felt in his opinion. Interview with David O'Toole, FTC Local Counsel, Chicago, Ill. (Oct. 27, 2009). Judge Gettleman took a stab at Trudeau saying "[h]ow Mr. Trudeau was able to eat a 'big' portion of prime rib 'marbled with fat' and a 'big hot fudge sundae with real ice cream, real hot fudge, real nuts and real whipped cream' and still follow Phase 4 of his own protocol remains a mystery." *Trudeau*, 567 F. Supp. 2d at 1023.

B. Supplemental Order in 2008

The Court described a very distasteful Trudeau and defended its 2007 decision by saying:

> Given Mr. Trudeau's history of deception and contemptuous violation of court orders, his apparent disrespect for the authority of the court and the purpose of the laws for which these orders were entered, and his willful efforts to deceive consumers into believing that his books, particularly the Weight Loss Book, [sic] contained material that they do not contain, the court confirms its finding that Mr. Trudeau is in contempt of the 2004 Injunction. [134]

Thus in August 2008, the court ordered Trudeau to pay five million one hundred and seventy three thousand dollars in consumer redress. The sum was derived from a "conservative estimate of the royalties Trudeau realized from the sale of the Weight Loss Book [sic] through the offending infomercials."[135] Trudeau plead poverty, but to no avail.[136] Also, because "Mr. Trudeau has made abundantly clear that nothing short of a complete ban, for a reasonable period of time, will achieve compliance with the court's previous directives to limit the content of his infomercials to non-misleading claims about his books," the court placed a total ban on all infomercials for three years.[137]

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[131] *Trudeau*, 567 F. Supp. 2d at 1022.

[132] Press Release, Federal Trade Commission, Federal Court Finds Kevin Trudeau in Civil Contempt (Nov. 21, 2007), *available at* http://www2.ftc.gov/opa/2007/11/kt.shtm.

[133] *Trudeau*, 567 F. Supp. 2d at 1023.

[134] FTC v. Trudeau, 572 F. Supp. 2d 919, 924 (N.D. Ill. 2008).

[135] *Id.* at 926. The FTC sought either $46 million to reimburse all purchasers of the book the full purchase price along with shipping and handling, or $6.75 million to disgorge Trudeau of his profits and an additional $10 million dollar performance bond be put in place. *Id.* at 924-25.

[136] *Id.* at 925. Trudeau presented the court with a balance sheet that was kept by his tax consultant who did not keep the balance sheet in the ordinary course of business and placed only what Trudeau directed him to on the sheet. *Id.* Trudeau's counsel, Jenner and Block, a prominent First Amendment firm from Chicago, Illinois, had also requested to withdraw as counsel. Amended Memorandum of Support of Defendant Kevin Trudeau's Motion for Stay of Judgment Pending Appeal, FTC v. Trudeau, No. 103CV03904, 2008 WL 4273604 (N.D. Ill. Aug. 21, 2008). Additionally, Trudeau had "sold" his assets to ITV Global for one hundred and twenty-one million dollars to be paid at the rate of one million per month. ITV had not held up the contract, but Trudeau took no action to enforce the contract. Therefore, the court looked upon his poverty plea with great skepticism. *Trudeau*, 572 F. Supp. 2d at 925.

After the court's decision, Trudeau requested the court stay its judgment pending an appeal and plead that the monetary judgment would force him into bankruptcy and that the three year ban was a prior restraint on his speech. [138] However, the FTC moved the court to amend its judgment to correct a mathematical error,[139] to clarify potential ambiguities regarding prohibited conduct,[140] and to extend the time periods associated with compliance-monitoring provisions already in place.[141] The court's frustration with Trudeau could be felt in the Supplemental Order and Judgment from November 4, 2008. There the monetary award was determined to be a civil contempt sanction, but the court did not clarify whether the award was coercive or compensatory or exactly how the money would be used.[142] The court also justified the three year injunction by noting that "Mr. Trudeau has proven himself incapable of respecting this court's narrowly tailored injunctions. The broader ban mandated by this Supplemental Order is therefore warranted."[143] With no explanation for the increase in monetary penalty, the court entered a new judgment of $37,616,161 in favor of the FTC.[144] Angry consumers, the FTC, and anyone with a conscious could not rejoice just yet. The 2008 decision, though meant to send a powerful message, was filled with gaping holes. The holes were large enough for Trudeau to climb through to escape the judgment on appeal.

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[137] *Trudeau,* 572 F. Supp. 2d at 925.

[138] Memorandum of Support of Defendant Kevin Trudeau's Motion for Stay of Judgment Pending Appeal, FTC v. Trudeau, No. 103CV03904, 2008 WL 4273604 (N.D. Ill. Aug. 20, 2008). Trudeau's prior restraint argument, though unsuccessful here, proved to be a winning argument on appeal. He argued that the three year ban stifled his commercial speech whether it was misleading or not. *Id.*

[139] The FTC alleged that the true calculation of royalties was $5.3 million not $5.1 million dollars because the court did not factor December 2007 royalties into the calculation. Plaintiff's Memorandum in Support of Its Motion to Clarify and Amend the Judgment Entered Against Defendant Kevin Trudeau on August 7, 2008, FTC v. Trudeau, No. 103CV03904, 2008 WL 4273605 (N.D. Ill. Aug. 21, 2008).

[140] The FTC did not know if the permanent restrictions of the 2004 Order continued with the 2008 judgment. *Id.*

[141] Finally, the FTC wanted the compliance monitoring from the 2004 Order to continue and be extended by the 2008 judgment. *Id.*

[142] Supplemental Order and Judgment at 2, FTC v. Trudeau, 572 F. Supp. 2d 919 (N.D. Ill. Nov. 4, 2008).

[143] *Id.*

[144] *Id.* at 4. Additionally, the court said "[t]he 2004 injunction remains in full force and effect." *Id.*

C. Appeal in 2009

Fresh from pleading poverty in 2008, Trudeau responded to the new $37.6 million dollar judgment by bragging "$37.6 million will not break me or change my lifestyle . . . . To enforce this ban [they] will have to sue me again."[145] But the FTC did not sue again, Trudeau appealed the 2008 judgment.

With new representation[146] and a familiar disregard for legal authority, Trudeau appealed to the Seventh Circuit Court of Appeals. The court held that Trudeau was in contempt for violating the 2004 order to not misrepresent the content of his book and rehashed the district court's analysis.[147] However, that is where the agreement with the district court ended. The court remanded the monetary sanctions back to the district court for an explanation of its calculations and administration of the award after finding that the penalty was neither coercive nor compensatory.[148] In lifting the three year ban,[149] the court reasoned that the ban was not a civil penalty as it was neither coercive nor compensatory, and the court rejected the FTC's contention that the ban was simply a modification of the 2004 Order because Trudeau was given no notice of any modification.[150] Even though the 2009 Seventh Circuit Court of Appeals opinion could be seen as a large victory for Trudeau, the court's frustration with Trudeau was felt in dicta:

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[145] Interview by Alex Jones with Kevin Trudeau, *supra* note 30. Trudeau bragged that he had companies in sixty countries around the world, so freezing his U.S. assets would not do a thing. *Id.* The preceding comments were made before the Seventh Circuit Court of Appeals reversed and remanded the Northern District of Illinois' 2008 judgment, so the three year ban was still in place when Trudeau conducted the Alex Jones interview. During the interview Trudeau joked about giving the interview was really a violation of the law. *Id.*

[146] Kimball R. Anderson with Winston & Strawn, LLP from Chicago, Illinois, now represents Trudeau. *See* Brief and Required Short Appendix for Defendant - Appellant Kevin Trudeau, FTC v. Trudeau, 579 F.3d 754 (7th Cir. 2009) (No. 08-4249). Anderson has been called one of the most expensive attorneys in Chicago. Interview with David O'Toole, *supra* note 130.

[147] FTC v. Trudeau, 579 F.3d 754, 757-60 (7th Cir. 2009).

[148] *Id.* at *12-17. The court concluded that the monetary award could not be purged, so it was not coercive. *Id.* at *13. So it must be compensatory, but even if this was the court's intent, the court did not explain how it reached the number and did not explain how the sanction would be administered. *Id.*

[149] *Id.* at *18-21. The overbreadth analysis does not apply to commercial speech in that a restriction may limit too much commercial speech. However, when the restriction restrains noncommercial speech as well as commercial speech, the restriction is too broad. Trudeau argued that the ban was more extensive than necessary because it re-

> The district court is in a better position to fashion an appropriate coercive remedy, should it choose to do so on remand. The court could also, of course, choose to impose a criminal sanction instead, or the district court could modify the Consent Order, on motion from the FTC or on its own motion, provided it give Trudeau sufficient notice and opportunity to be heard on the matter.[151]

On remand, David O'Toole, who represents the FTC in Chicago, said that the FTC will file new motions asking for a bond; however, with Trudeau pleading poverty and claiming no interest in the things he sells, O'Toole is troubled that this may not work.[152] Trudeau's pompous attitude toward authority suggests that perhaps nothing will.

V. CATCH ME IF YOU CAN: PAST AND FUTURE METHODS

With *FTC v. Trudeau* headed back to the district court, Trudeau may have won yet another battle, but will this slick

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stricted his commercial and noncommercial speech as well as misleading and truthful speech. Additionally, Trudeau argued that the restriction failed the narrow tailoring prong of *Central Hudson*. Brief and Required Short Appendix for Defendant - Appellant Kevin Trudeau, *supra* note 146.

[150] *Id.* The ban was "clearly not compensatory." *Id.* But "[t]o the extent that 'a sanction operated whether or not a party remains in violation of the court order, it obviously does not coerce any compliance.'" *Id.* (quoting Harris v. City of Philadelphia, 47 F.3d 1311, 1329 (3d. Cir. 1995)). The FTC could have modified the 2004 Order if the court would have granted a motion to modify, but no such motion was ever presented much less granted. *Id.* at *20.

[151] FTC v. Trudeau, 579 F.3d 754, 779 (7th Cir. 2009).

[152] Interview with David O'Toole, *supra* note 130. In February 2010, Trudeau was sentenced to thirty days in jail for contempt of court because he "persuaded visitors to his website to help him launch an e-attack" that "hopelessly clogged" Judge Gettleman's computer. In addition, Trudeau was ordered to surrender his passport and post a $50,000 bond. Lila Shapiro, *Kevin Trudeau Sentenced: infomercial King to Jail for Contempt of Court*, HUFFINGTON POST, Feb. 17, 2010, http://www.huffingtonpost.com/2010/02/17/kevin-trudeau-sentenced-i_n_466173.html.

sleaze-ball win the war? I would argue, yes. There is no legal doctrine that can stick to him.

The FTC has attempted holding Trudeau in contempt for violating past settlements or court orders, has issued more injunctions against him, and fined him for millions of dollars. But nothing is stopping Trudeau from misleading the nation through his infomercials and books. The following section analyzes some legal doctrines or theories that could be used to punish Trudeau, but I believe all will ultimately fail.

A. Commercial Speech

Commercial speech is "speech that does 'no more than propose a commercial transaction.'"[153] To determine if speech is commercial speech, *Bloger v. Youngs Drug Products Corporation* said to look for three factors: an advertisement, economic motivation, and reference to a specific product.[154] Such speech is afforded some degree of Constitutional protection even though it receives less protection than other forms of speech;[155] however, "speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another."[156] The test for restrictions on commercial speech comes from *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*: whether the speech is protected by the First Amendment, not misleading or unlawful; "whether the asserted governmental interest is substantial;" "whether the regulation directly advances the governmental interest asserted; whether it is not more extensive than is necessary to serve that interest."[157]

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[153] Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976) (quoting Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973)).

[154] Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 66-68 (1983).

[155] *See* Bd. of Tr. of the State Univ. of New York v. Fox, 492 U.S. 469, 482 (1989) (discussing the financial motivation behind commercial speech that protects it from being chilled).

[156] *Virginia State Bd. Of Pharm.*, 425 U.S. at 771-72; Bigelow v. Virginia, 421 U.S. 809 (1975); "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." Bery v. City of New York, 97 F.3d 689, 696 (2nd Cir. 1996) (quoting Riley v. Nat'l Fed'n of Blind of North Carolina, 487 U.S. 781, 801 (1988)).

One possibility of using commercial speech to limit Trudeau's advertising is derived from the first prong of *Central Hudson*, the idea that there is no "constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it."[158] However, this would seem to be what the FTC is already doing in the many court actions they have brought over the past decade.[159] They have tried to limit Trudeau's advertising in the past, but Trudeau just comes back even stronger with a new scheme that somehow slips by.

A second option, that perhaps could not be used to prosecute Trudeau but rather justify his behavior, has not been directly addressed by the Supreme Court. This is the intertwining of commercial speech with a protected product, like a book.

The idea of intertwining commercial speech with protected noncommercial speech stemmed from *Riley v. National Federation of the Blind of North Carolina* where the Court said 'we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech."[160] The Court tried to limit *Riley* to its facts the next year with *Board of Trustees of the State University of New York v. Fox*.[161] Justice Scalia, in writing for the Court, attempted to distinguish *Riley* by saying that the commercial speech "*was* 'inextricably intertwined' because the state law *required* it to be included."[162] He clarified his point by saying "[w]e have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech."[163]

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[157] 447 U.S. 557, 566 (1980). However the least restrictive means are not required, but the narrow tailoring prong must be reasonable not necessarily perfect. Greater New Orleans Broadcasting Assn., Inc. v. United States, 527 U.S. 173 (1999).

[158] *Central Hudson*, 447 U.S. at 563. To do this the FTC must argue that Trudeau's speech in the infomercials is undeniably commercial speech because it is an advertisement (an infomercial) made with economic motivation (buy the book) which references a specific product (the book). *See Bolger*, 463 U.S. at 66-68.
The final factor may be slightly more difficult to meet because generally books, meaning the ideas contained therein, are not considered to be products. However, Trudeau is not just selling the ideas in the books, but he is selling the literal book: binding, dust jacket, pages and all, so the book could be a product.

[159] *See supra* notes 33-37 and accompanying text.

[160] Riley v. Nat'l Fed'n of the Blind of North Carolina, 487 U.S. 781, 796 (1988) (discussing speech intertwined with charitable solicitations).

[161] 492 U.S. 469 (1989).

The intertwining argument seems to be fully settled, yet Trudeau hangs his hat on the *Riley* analysis.[164] Additionally, lower courts are split on when commercial speech intertwines with noncommercial speech and when it does not, especially if the commercial speech is an advertisement for the protected speech of a book. However, no lower court has analyzed intertwining commercial speech in the context of false or misleading commercial speech.[165]

Lacoff v. Buena Vista Publishing, Incorporated[166] and *Keimer v. Buena Vista Publishing, Incorporated*[167] reach different conclusions on the nature of advertisements for books that arguably could be intertwined with the book. *Lacoff* said that advertisements on the flyleaf of a book are part of the book and not separate advertisements; therefore, the advertisements are fully protected speech.[168] However, *Keimer* concluded that quotations from the book repeated on the book cover and flyleaf were commercial speech.[169] However, both *Keimer* and *Lacoff* are different from Trudeau's quite separate infomercial which should not be packaged with his books as protected speech.

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[162] *Id.* at 474 (emphasis in the original). "*Riley* involved a state-law requirement that in conducting fundraising for charitable organizations (which we have held to be fully protected speech) professional fundraisers must insert in their presentations a statement setting forth the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charities." *Id.*

[163] Bd. of Tr. of the State Univ. of New York v. Fox, 492 U.S. 469, 475 (1989) (quoting *Central Hudson*, 447 U.S. at 563). Scalia really lets his hair down when he says "[n]o law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares." *Id.* at 474.

[164] Brief and Required Short Appendix for Defendant - Appellant Kevin Trudeau, *supra* note 146. Trudeau discussed and relied on *Riley* as well as *Lacoff v. Buena Vista Publ'g, Inc.*, 705 N.Y.S.2d 183 (Sup. Ct. 2000).

[165] *Bery v. City of New York* said that the "sale of protected materials is also protected." But the *Bery* case involved selling artwork in public places without a vender's license, so it is easily distinguishable from the facts of *FTC v. Trudeau.* 97 F.3d 689, 695 (2d Cir. 1996). Additionally, *Rezec v. Sonly Pictures Entertainment, Inc.* said that advertising reflecting the content of a film would be fully protected speech, but this rule applied only when the advertisements were "merely . . . adjunct[s] to the exhibition of the film[s], such as by using photographs of actors in films." 10 Cal. Rpt. 3d 333, 339 (Ct. App. 2004) (internal citation omitted). *Rezec* is also different from *FTC v. Trudeau* because Trudeau is not using the advertisements as mere adjuncts to the books he is selling, but the advertisements are separately produced infomercials that rely on Trudeau's character to sell a product that just happens to be a book.

[166] 705 N.Y.S.2d 183 (Sup. Ct. 2000).

[167] 75 Cal. App. 4th 1220 (Ct. App. 1999).

One way to untangle the intertwining commercial speech mess is to simply say that infomercials and advertisements that sell books do not convey any political message but, like selling housewares in *Fox*, propose a purely commercial transaction, buy the book. Therefore, Trudeau could not use intertwining commercial speech to defend his actions.

B. What About the Book: Torts, Criminal Law and the First Amendment

If tricky Trudeau can escape the law with his advertising, could he be liable for the book itself? Courts have struck this idea down for the following reasons.

First, books are not products because their words and images are not sufficiently tangible to constitute a product.[170] Additionally, "imposition of products liability for a defect in the written contents of a publication would have a chilling effect on the freedoms of speech and press . . . ."[171] So, it would seem that tort liability for Trudeau would be out of the question. Case law backs up this proposition. In Florida, a man sued Atkins Nutritionals, Incorporated and the co-executor of Dr. Robert C. Atkins' estate for product liability, negligent misrepresentation and deceptive conduct.[172] The court held that the ideas in the diet book were protected by the First Amendment and thus not defective or dangerous.[173]

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[168] *Lacoff*, 705 N.Y.S.2d at 191. However, the *Lacoff* court relied on New York law which provides broader protection for speech than federal law.

[169] *Keimer*, 75 Cal. App. 4th at 1233 (concluding that advertising materials relating to a book are commercial speech if they consist of "advertising statements which were true, or were opinion or 'rhetorical hyperbole' and thus were not verifiably false").

[170] AM. L. PROD. LIAB. 3d § 119:1 (2009). The binding of a book or physical pages could be products, but actual ideas are intangibles. *See* Gorran v. Atkins Nutritionals, Inc., 464 F. Supp. 2d 315 (S.D.N.Y. 2006) (applying Florida law).

[171] AM. L. PROD. LIAB. 3d § 119:3 (2009).

[172] *Goran*, 464 F. Supp. 2d 315. The plaintiff alleged that after two months of following the Atkins Diet, his cholesterol level shot up and had to have an angioplasty to unclog one of his coronary arteries. *Id.*

Criminal liability has one tiny glimmer of hope in *Rice v. Paladin Enterprise, Incorporated* or the "Hit Man" case.[174] *Hit Man: A Technical Manual for Independent Contractors* , a how-to book professional murders, was the center of the litigation.[175] The First Amendment did not pose a bar to finding that the publisher was civilly liable as an aider and abettor of the murders.[176] However, Paladin Enterprises conceded that their intent was to cause imminent lawless action, thus opening the door for liability.[177] However, no other court has followed this case, so it would seem that criminal liability, like tort liability, is dead on arrival.

C. Contracts Theory

The contracts theory would target the ideas of a book that are objectively verifiable, such as how-to books or weight loss books, and give the consumer an opportunity to sue if the advertisements were not the same as the book or if the ideas in the book did not work.[178] This offer and acceptance idea stems from *Groden v. Random House, Incorporated* where the court observed that:

> [I]t is important to distinguish between advertising statements made to summarize an argument or opinion within a book and those made about a book as a product. The former are essentially a matter of argument, to be accepted or rejected by those

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[173] *Id.* (holding that the book itself was noncommercial speech and entitled to full First Amendment protection).

[174] Rice v. Paladin Enterprise, Inc., 128 F. 3d 233 (4th Cir. 1997). *See also* Braun v. Soldier of Fortune Magazine, 968 F.2d 1110 (11th Cir. 1992) (holding a publisher liable for negligence in publishing an advertisement for a hit man for hire).

[175] *Id.*

[176] This idea is presented in the context that every civil law penalty has a criminal law mirror image. For example, one could roughly equate rape in the criminal context to assault and battery in the civil context.

[177] *Id. See generally* Brandenburg v. Ohio, 395 U.S. 444 (1969).

[178] Fentonmiller, *supra* note 33, at 596-97. Fentonmiller also proposes a commercial conduct theory, but I believe this is possibly the weakest of all ideas, so it is not discussed. *See id.* at 601-610 (equating how-to books to computer source code).

> who read the book, while the latter might often be statements of fact that might be verifiable.[179]

However, the contracts argument would probably not hold water because of the strong policy argument of the slippery slope.

CONCLUSION

While the courts and FTC sit with their hands tied, Trudeau cleverly side steps all existing law by exploiting the First Amendment. Since his last bout of litigation, he has published two new books. *Debt Cures "They" Don't Want You to Know About* débuted in 2008,[180] and *Free Money "They" Don't Want You to Know About* arrived in 2009.[181] For over a decade Trudeau has made a career out of fleecing America, and as detestable as his behavior may be, there is no legal doctrine that can outwit Trudeau who has truly discovered his criminal niche.

Catherine Bryant Bell

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[179] *Id.* (emphasis omitted) (discussing Groden v. Random House, Inc., 61 F.3d 1045 (2nd Cir. 1995)).

[180] DEBT CURES, *supra* note 1.

[181] KEVIN TRUDEAU, FREE MONEY "THEY" DON'T WANT YOU TO KNOW ABOUT (2009).

COMMENT

IMMIGRANT TEACHERS IN HIGH-MINORITY SCHOOLS: USING IMMIGRATION LAW TO BYPASS STRICT SCRUTINY & THE COLORBLIND CONSTITUTIONALISM OF *PARENTS INVOLVED*

INTRODUCTION

> We are just students trying to become lawyers, doctors, congressmen like yourself and one day president, so we can make a change to not just the state of South Carolina but also the world. We are not quitters.[1]

Nestled amongst the golden tobacco fields of Dillon, South Carolina is J.V. Martin Junior High school. This "hodgepodge of decrepit, decaying and unsafe facilities" has been characterized by the paint peeling of its walls, and by the train which barrels past it six times a day drowning out the voices of the teachers within.[2] The world gained notice of this small South Carolina school on February 25, 2009, when President Barack Obama read part of a letter to Congress from Ty'Sheoma Bethea, a student at Martin, to draw attention to a national crisis - the education of minority schoolchildren.

Although it has been over fifty-five years since *Brown v. Board of Education*, public schools in the United States have failed at closing the racial divide in education. In many areas of previously de jure segregated states, such as South Carolina, schools that are almost entirely white or black have become commonplace. These students often are the casualties of the battle over educational segregation that began over fifty years ago. Schools are largely more segregated now than they were in 1970, and the result has been a staggering gap in scholastic achievement, access to higher education, and graduation rates between minority students and their white counterparts.[3] For the majority of these students, high levels of concentrated poverty and an absence of adequate outside resources combine to create schools with failing facilities, high student to teacher ratios, and a less qualified faculty.[4]

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[1] Letter from Ty'Sheoma Bethea to Congress; *see* Howard Witt, *Letter From the Heart Lands Teen in First Lady's Box for Tonight's Speech*, CHI. TRIBUNE, Feb. 24, 2009, *available at* http://www.chicagotribune.com/news/nationworld/chi-obama-schoolgirlfeb25,0,6067620.story.

[2] Susanne M. Schafer, *Crumbling SC School Gets Mention in Obama Speech*, ASSOC. PRESS, Feb. 25, 2009 (quoting Bud Ferillo), *available at* http://abcnews.go.com/us/wirestory?id=6959261.

In the wake of the Supreme Court's recent decision in *Parents Involved*, race-conscious implementation of federal legislation seems to have become close to impossible. The Court's colorblind educational policy reinforces the current form of race subordination by ignoring the inherent contradiction between local control and educational equity.[5] Therefore, students like

Bethea and her classmates at J.V. Martin are stuck in limbo between the interests of society in furthering their education, and the role of the Supreme Court in safeguarding the equal protection of all people. So how can this problem be fixed? First, there must be a consideration of the factors that lead to these poor educational outcomes in minority communities. Many factors exist, but one of the most prominent is the inability of certain school systems to consistently find or retain quality teachers. While what measures quality is a debatable subject, there is no debate as to whether better teachers lead to better results.[6]

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[3] John Brittain, et al., *Racial Disparities in Educational Opportunities in the United States*, 6 SEATTLE J. FOR SOC. JUST. 591, 596-97 (2008).

[4] Judith A. Winston, *Rural Schools in America: Will No Child Be Left Behind? The Elusive Quest for Equal Educational Opportunities*, 82 NEB. L. REV. 190, 196 (2003) (discussing some of the reasons for the poor academic achievement of many rural U.S. counties and states).

[5] *See generally* Luis Urrieta, Jr., *Community Identity Discourse and the Heritage Academy: Colorblind Educational Policy and White Supremacy*, 19 INT' L J. OF QUALITATIVE STUD. IN EDUC. 455 (2006).

[6] *See* Steven G. Rivkin, Eric A. Hanushek & John F. Kain, *Teachers, Schools and Academic Achievement*, 73(2) ECONOMERICA 417, 419 (2005) (noting "that having a high quality teacher throughout elementary school can substantially offset or even eliminate the disadvantage of low socioeconomic background"); *see also* Joseph O. Oluwole & Pres-

Many factors may contribute to the lack of quality teachers in minority communities. These communities are often some of the most socioeconomically disadvantaged communities in the United States.[7] Blanketed in poverty, these schools often produce poorer educational outcomes than other schools.[8] These results can be attributed to the effects of poverty on teachers, such as lower salaries and a lack of the outside infrastructure that is commonly available in wealthier communities.[9] With the enactment of the No Child Left Behind Act (NCLB) in 2002, the demand for adequate teachers has become even greater. It provides that schools with poor test scores and schools which have an underperforming demographic are subject to greater sanctions and are more likely to incur staff changes.[10] By raising the penalties associated with failing test scores, the NCLB encourages teachers to leave challenging schools for ones with higher achieving students.[11] Furthermore, the declining number of young professionals entering the field of teaching coupled with the mass exodus of accomplished teachers to retirement has left the pool from which these schools can hire extremely diminished.[12]

To counteract this problem, many poor and understaffed school districts have been forced to recruit heavily and offer generous hiring incentives to lure college graduates or other high-

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ton C. Green, III, *No Child Left Behind Act, Race, and* Parents Involved, 5 HASTINGS RACE & POVERTY L.J. 271 (2008).

[7] *See* GARY ORFIELD, THE CIVIL RIGHTS PROJECT, HARV. UNIV., REVIVING THE GOAL OF AN INTEGRATED SOCIETY: A 21ST CENTURY CHALLENGE 1 (2009).

[8] *See generally* RURAL SCHOOL AND COMMUNITY TRUST, "WHY RURAL MATTERS: THE REALITIES OF RURAL EDUCATION GROWTH" i-ii (Allison Younches ed., 2007). A noticeable correlation exists between poverty and educational outcome for minorities, especially in the Southern United States. Eight of the thirteen states facing the worst socioeconomic challenges are in the Southeast and Mid-South Delta. *Id.* As a result, seven of these states are listed as one of the thirteen states with the poorest education outcomes in the United States. *Id.*

[9] *See* Winston, *supra* note 4, at 206.

[10] James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 972-77 (2004) (describing the effect of the No Child Left Behind Act and state accountability systems on underperforming schools' ability to retain and attract high quality teachers).

[11] *Id.*

[12] NATIONAL COMMISSION ON TEACHING AND AMERICA'S FUTURE (NCTAF), AMERICA'S SCHOOLS ARE ABOUT TO BE HIT BY THE LARGEST TEACHER RETIREMENT WAVE IN HISTORY: ARE WE READY? 12 (2009).

ly qualified individuals to teach in their schools.[13] The result, however, has been "a chronic cycle of teacher hiring and replacement, [which] sap [these school districts] of precious dollars that could be better spent to improve teaching quality and student achievement."[14] So how can the government provide for these poor minority communities to hire and retain quality teachers without triggering strict judicial review? The solution may be found in an unlikely source - Congress's plenary power over immigration. Although immigration law has often been criticized as the "last vestige of an antique period of American law,"[15] characterized by explicitly racially discriminatory statutes, it remains one of the last areas in which race-conscious legislation may be upheld on a standard less than strict scrutiny.[16] The Court has stated that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens,"[17] and that federal immigration statutes are "largely immune from judicial control."[18] While the Court has slowly departed from its understanding that all federal immigration laws are immune from judicial review, it has maintained that its power to review is extremely limited, giving great deference to the legislature and reviewing statutes only for rationality. Using immigration law to bypass strict scrutiny, Congress could enact a statute which encourages foreign students already in the United States on F-1 visas to teach in minority rich schools by offering them the ability to adjust status to that of permanent resident upon teaching in these schools for a certain period of time.

American universities currently educate over a quarter of a million foreign students, many of whom are the best and brightest of their homeland.[19] Despite many international students' desire to remain in the United States upon graduation, the difficulty of securing either permanent resident or "specialty-worker" visas forces the majority of these highly-educated students abroad.[20] Although race and immigration have often represented diametric opposites in the values of the United States - the contradiction epitomized by the Statue of Liberty and the institution of slavery - the combination of the allure of the golden door for immigrants and the critical need for highly educated teachers in minority communities may represent an opportunity not only to change the African-American perspective on immigration, but also provide quality education for minority students in the United States. By enacting a federal immigration statute which (a) increases the H-1B quota for foreign students at accredited American universities or colleges who hold offers of employment from under-performing, predominately minority public schools within the United States, and (b) automatically adjusts these students' status to legal permanent resident upon teaching in these schools for six continuous years, the United States may be able to both retain and attract the world's best intellectual talent while educating its underperforming minority schoolchildren.

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[13] *Id.* at 12-13.

[14] *Id.* at 13.

[15] Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 5 (1998).

[16] *See, e.g.*, Unification Church v. INS, 547 F. Supp. 623, 628 (D.D.C. 1982); Ramos v. United States Civil Serv. Comm'n, 376 F. Supp. 361, 366 (D.P.R. 1974), *aff'd in part*, 426 U.S. 916 (1976); Bertrand v. Sava, 684 F. 2d 204 (2nd Cir. 1982); In re Longstaff, 716 F.2d 1439 (5th Cir. 1983).

[17] Fiallo v. Bell, 430 U.S. 787, 792 (1977) (quoting Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)).

[18] *Id.* (quoting Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953)).

In part one of this paper, I will discuss the plight of minority schoolchildren in America and the continuing achievement gap in education. I will also discuss some of the factors that have attributed to the general failure of U.S. schools to educate their non-white students on the same level that they educate their white students, paying special attention to teacher quality and teacher retention rates. I will further indicate how state assessment systems and the No Child Left Behind Act have had a negative impact on high-minority schools as they create additional incentives for teachers to leave challenging teaching environments for higher achieving schools. In part two, I will show

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[19] *See* Vivek Wadhwa, *America's Other Immigration Crisis*, THE AMERICAN: J. AM. ENTERPRISE INST. 1 (July-Aug 2008), *available at* http://www.american.com/archive/2008/july-august-magazine-contents/america2019s-other-immigration-crisis.

[20] *Id.* (retelling the story of Sanjay Mavinkurve, a prominent software designer for Google and Facebook, who despite his dream of living in America was forced to return to Singapore because of the difficulty in securing his fiancée a visa).

how using Congress's plenary power over immigration, a race-conscious statute directed at the education of minority students could be upheld, even after the Court's decision in *Parents Involved*. In part three, I will address the current status of foreign students in the United States, describe the proposed statute in detail, demonstrate how this proposed statute will work, and how it would benefit all involved, despite the racial tension between many native-born minorities and recent immigrants.

I. STUDENTS OF COLOR IN THE UNITED STATES AND THE IMPORTANCE OF QUALITY EDUCATORS

A. The Current Status of Minority Students in a Color-Blind United States

> The official upholders of law and order in Oxford, a group of Mississippi plain-clothesmen chortle as one of their number takes practice swings with a billy and another ties on an identifying armband. They are on the campus not to put down a riot but to take part in one of the incidents which led up to it. They mobilized earlier in the week to back up Lieut. Governor Paul Johnson when he turned [James] Meredith and U.S. marshals away from the enrolling office. But when the riot broke out, all local and state cops made themselves scarce.[21]

From the above caption of a photograph taken days before the attempted integration of the University of Mississippi to the image of Governor Wallace blocking the entrance of two black students into Foster Auditorium at the University of Alabama, the legacy of the nation's resistance to the coeducation of the races has been thoroughly documented. Forty-five years later, while the stain of racism has not yet thoroughly been purged from these institutions, integration in schools of higher education has largely been achieved. But the Court's decision in *Brown* and its subsequent demand in *Brown II* was not limited to public colleges and universities, but rather extended to all forms of public education. While largely failing in their attempts to prevent the integration of their universities, these same communities have achieved significant success in their goal of maintaining separate classrooms for their children.

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[21] PAUL HENDRICKSON, SONS OF MISSISSIPPI: A STORY OF RACE AND ITS LEGACY 13 (Alfred A. Knopf 2003) (quoting the caption underneath a photograph taken by Charles Moore in Oxford, Mississippi, in September of 1962 and published in *Life* magazine).

Across the United States, racial isolation and school segregation are increasing.[22] Through the establishment of private schools and the rezoning of school districts, in many communities across the South, 98% black public schools and 100% white private schools have become commonplace.[23] The trend can also be found in the North, where 60% of all black students in New York attend schools that are at least 90% black.[24] The result of increased segregation is an ever widening achievement gap in education between white students and non-white students. For example, in 2007, the average fourth grade white student's reading score was 230, just eight points shy of "proficient", while the average score for black and Latino students, 203 and 204 respectively, were both below the 208 point mark that indicates a "basic" reading level.[25] The results are similar in mathematics[26] and science,[27] as well. This achievement gap also manifests itself outside the bounds of standardized testing, as minority rich schools typically have much higher dropout rates, lower graduation levels, and higher rates of suspension, expulsion, and criminal sanctions.[28] As Professor Sheryll D. Cashin observes, "we are not even living up to the repugnant principle announced in *Plessy v. Ferguson*. Our schools are separate, but hardly equal."[29]

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[22] *See* Brittain, *supra* note 3, at 595-96.

[23] SAVE THE CHILDREN, AMERICA'S FORGOTTEN CHILDREN: CHILD POVERTY IN RURAL AMERICA 28 (2002).

[24] *See* Brittain, *supra* note 3, at 600.

[25] NATL. CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS: THE NATION'S REPORT CARD, READING 15-20 (2007) [hereinafter THE NATION'S REPORT CARD: READING].

[26] NATL. CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS: THE NATION'S REPORT CARD, MATHEMATICS 15-20 (2007). In 2007, fourth grade white students across the nation averaged a mathematic achievement score of 248, which was just one point shy of "proficient" and well above the 222 average of black students and the 227 average for Hispanic students. *Id.*

[27] NATL. CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS: THE NATION'S REPORT CARD, SCIENCE 5-10 (2005). Fourth grade white students averaged a score of 162, eight points shy of "proficient," while some minority students failed to surpass the "basic" plateau of 138 with blacks scoring 129 and Hispanics, on average, scoring 133. *Id.*

[28] *See* Brittain, *supra* note 3, at 596.

B. The Teacher Quality Gap

Scholars and commentators have identified a number of factors that contribute to the educational achievement gap between minority and white students, including the connection between poverty and scholastic achievement, teacher and staff turnover rates, teacher quality, class size, lower quality course offerings, and inferior facilities.[30] As a result, Congress enacted the No Child Left Behind Act in 2002 to address these problems and "to ensure that all children have a fair, equal, and significant opportunity to obtain a high quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments."[31] To achieve this goal, the Act requires all states to create their own assessment systems that establish "challenging" academic standards through which they test students regularly, so that student achievement can be traced and accountability for schools and teachers can be strengthened. It also mandates that schools employ only "highly qualified" teachers.[32] Teachers are considered "highly qualified" if they (a) are fully certified, and (b) are competent in the subjects that they teach.[33]

The NCLB, however, does more than establish a bare system of standards and assessments. It also creates a system which sanctions underperforming schools and faculty.[34] Six years after its enactment, the evidence has revealed that the number of schools which have incurred these sanctions are disproportionately black or Latino, and high poverty schools.[35] Furthermore, while these sanctions were implemented to ensure teacher and school accountability, they have had the negative effect of discouraging young individuals from entering the teaching profession, deterring quality teachers from teaching in challenging environments, and reducing the number of teachers in the United States.[36]

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[29] Sheryll D. Cashin, *American Public Schools Fifty Years After* Brown*: A Separate and Unequal Reality*, 47 HOW. L.J. 341, 343 (2004).

[30] *See id.* at 348 (quoting Bd. of Educ. v. Dowell, 498 U.S. 237, 262 (1991) (Marshall, J., dissenting)).

[31] 20 U.S.C. §6301 (2008).

[32] 20 U.S.C. §6319(a)(1).

[33] 20 U.S.C. §7801(23); *see* Ryan, *supra* note 10, at 939-40.

[34] *See* 20 U.S.C. §6316(b)(1)-(3)

[35] GARY ORFIELD, THE CIVIL RIGHTS PROJECT, HARV. UNIV., REVIVING THE GOAL OF AN INTEGRATED SOCIETY: A 21ST CENTURY CHALLENGE 4 (2009).

While scholars disagree over which factor attributable to minority schools has the greatest effect on the scholastic achievement, no one denies that teachers matter.[37] Numerous reports document that scholastic environment, teacher ratios, and quality of teachers have more effect on students than race or class.[38] In the Gautreaux experiment, the result of relocating low-income black students from the poorest areas of Chicago and placing them into schools with higher quality teachers and lower teacher-student ratios was equal performance between the black students and their white peers.[39] However, because of the high demand for quality teachers, the majority of minority students remain in schools with less prepared educators and classmates.[40] These schools, whether in the rural South or the urban North, are often some of the most socioeconomically disadvantaged communities in the United States.[41] In general, states and school districts which offer high or competitive hiring salaries have fewer problems in obtaining quality teachers than do poor states and school districts.[42] Blanketed in poverty, these schools are stuck in a vicious cycle as their inability to offer competitive salaries to hire or retain quality teachers results in poorer educational outcomes for the students, which then manifests itself in the exodus of the remaining quality teachers to schools with affluent, white students.[43]

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[36] *See* Ryan, *supra* note 10, at 971-78.

[37] *See* Brief for 553 Social Scientists as Amici Curiae Supporting Respondents at 3, app. 31, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 551 U.S. 701 (2007) (Nos. 05-908 & 05-915) (indicating the correlation between inexperienced teachers and poor academic performance by students).

[38] *See* Cashin, *supra* note 29, at 356 (discussing the Gautreaux experiment).

[39] *Id.*

[40] *See* ORFIELD, *supra* note 35, at 6.

[41] *Id.*

[42] *See generally* NATIONAL CENTER FOR EDUCATION STATISTICS, STATUS OF EDUCATION IN RURAL AMERICA 79-105 (2007).

[43] *See* Ryan, *supra* note 10, at 974. As Professor Ryan has observed:

By increasing the demand for and decreasing the supply of highly qualified teachers, the NCLB has reinforced the distinct disadvantage of minority-rich schools in obtaining adequate educators for their students. In raising the stakes attached to test scores, the NCLB encourages teachers to leave schools that will likely not make adequate yearly progress.[44] Furthermore, certain state accountability systems reward teachers with bonuses when their classes produce sufficient test scores, while threatening teachers whose students perform poorly with termination.[45] For these reasons, attaching sanctions and rewards to test results reinforces the desire of teachers to leave these predominantly minority schools for the schools that are most likely to succeed under the NCLB and state accountability systems. As has been noted, the majority of schools that have been sanctioned under the NCLB have had a nonwhite majority.[46] The declining number of minority teachers has also put predominately minority communities at a disadvantage in adequately staffing their schools, as their white teachers tend to relocate as soon as the opportunity presents itself.[47] The result has been noticeable hiring shortages in urban, low-income, minority schools and remote rural areas, despite the overall teacher supply.[48]

> [S]chools with poor and minority students are more likely to perform poorly on state tests than schools with relatively affluent, white students. Poor and predominantly minority schools already struggle to attract and retain good teachers. Study after study documents that high-poverty and high minority schools have less qualified and less-experienced teachers. Empirical studies also consistently indicate that, when given the chance to chose, teachers systematically move to schools with fewer poor, minority, and low-achieving students.

Id. (internal footnotes omitted).

[44] 20 U.S.C. §1116(b)(7)-(8).

[45] *See* Charles T. Clotfelter & Helen F. Ladd, *Recognizing and Rewarding Success in Public Schools*, *in* HOLDING SCHOOLS ACCOUNTABLE: PERFORMANCE-BASED REFORM IN EDUCATION 23, 46 (Helen F. Ladd ed., 1996).

[46] *See* Ryan, *supra* note 10, at 974.

[47] Wendy Parker, *Desegregating Teachers*, 86 WASH. U.L. REV. 1, 33-36 (2008).

[48] *Id.*

C. Parents Involved *and the Current Standard for Redressing Scholastic Racial Disparities*

In the 2007 consolidated case of *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education* (*Parents Involved*), the Supreme Court announced its current standard of review for race-conscious measures designed to address racial segregation in schools.[49] The plurality opinion, authored by Chief Justice Roberts, reiterated the Court's willingness to adhere strictly to colorblind constitutionalism so the Court could achieve the Fourteenth Amendment's ultimate goal of eliminating race as a factor in governmental decision making. [50] In his concurrence, Justice Kennedy, the swing vote for the majority, rejected the plurality's insistence on colorblind constitutionalism but emphasized that racial classifications are constitutionally prohibited "absent some extraordinary showing" in cases of de facto segregation.[51] While Justice Kennedy's concurrence advocates certain race-conscious measures as acceptable under strict scrutiny, many of these are impractical or inefficient for most school districts, especially at the elementary and secondary school level.[52] As a result of *Parents Involved*, schools have largely lost the ability to utilize racial distinctions in pre-university scholastic settings. With substantial evidence indicating that race-conscious measures are, if not necessary, of at least paramount importance in remedying educational disparities based on race, the Court's opinion in *Parents Involved* seems to present a mountainous hurdle for those wishing to close the achievement gap.[53]

Parents Involved was the culmination of the Court's near half-century of work attempting to purge U.S. jurisprudence of the stain of racial bigotry left by the Supreme Court around the turn of the nineteenth century. Under the control of Chief Justice Melville Fuller, the Court entrenched categorical discrimination into American law with cases like *Plessy v. Ferguson*[54] and *Cumming v. Richmond County Board of Education.*[55] As a result, almost any classification based on race, either benign or malignant, will be reviewed with the strictest scrutiny. The Court, however, has refused to overturn a number of these Fuller Court cases which provide precedent for legal racial discrimination, e.g., *Chae Chan Ping v. United States* and *Fong Yue Ting v. United States.*

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[49] 551 U.S. 701 (2007).

[50] *Id.* at 730 (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989)); *see also* DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 76 (6th ed. 2008).

[51] *Id.* at 796 (Kennedy, J., concurring).

[52] *See* BELL, *supra* note 50, at 80.

[53] *See* Oluwole & Green, *supra* note 6, at 300-01.

II. BEYOND THE BOUNDS OF STRICT SCRUTINY – IMMIGRATION LAW

A. Race Discrimination and the Constitutional Law of Immigration: Traditionally

During the mid-nineteenth century, the allure of cheap land and gold drove a rush of people west of the Mississippi River and into California. With each passing year, as the population of the western United States continued to grow and western towns began to develop into communities, the demand for cheap labor became an issue of immediacy.[56] Congress found its answer for this labor shortage across the Pacific in a war-torn China.[57] In 1868, China and the United States entered into the Burlingame Treaty, which provided for unrestricted Chinese immigration in exchange for improved trade relations.[58] For years, thousands of Chinese immigrants flooded into the United States to work on the railroads and in the fields; however, by 1869, with the dawn of a post-Civil War depression and the completion of the transcontinental railway, the once flowering job market began to wither. The result was intense prejudices against the Chinese immigrant workforce. Aware of the animosity of the labor unions toward the Chinese immigrants building in the West, Congress enacted the Chinese Exclusion Act of 1882, which suspended all future immigration of Chinese laborers into the United States for ten years. In this turbulent environment, the Supreme Court decided two cases which have become the foundation for the plenary power doctrine: *Chae Chan Ping v. United States*[59] and *Fong Yue Ting v. United States.*[60]

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[54] 163 U.S. 537 (1896).

[55] 175 U.S. 528 (1899).

[56] *See* FRANK F. CHUMAN, THE BAMBOO PEOPLE 3-4 (1976).

[57] *Id.*

[58] *Id.* Specifically, Article 5 of the Burlingame Treaty provides:

> The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from one country to the other for purposes of curiosity, of trade, or as permanent residents.

Id.

The Chinese Exclusion Act prohibited the immigration of Chinese laborers to the United States.[61] Yet, the Act also stated immigrants of Chinese decent who had resided in the United States since 1880 had the right to leave the United States and return, provided they were issued a certificate of residence evidencing these rights.[62] In 1887, a Chinese laborer by the name of Chae Chan Ping, who had immigrated to the United States in 1875, obtained such a certificate and left for China.[63] In 1888, while Chae Chan Ping made his return voyage to the United States, Congress voided the certificate program, leaving no exceptions for immigrants who had left already having received a certificate.[64] When he arrived one week later, he was excluded.[65] In the 1889 case of *Chae Chan Ping v. United States*, the Court unanimously declared Ping could be excluded from the United States because a Congressional decision to exclude aliens based solely upon race "[was] conclusive upon the judiciary."[66] The Court held the federal power to regulate immigration was outside the scope of judicial review because it was a necessary and absolute incident of national sovereignty.[67]

Four years later in *Fong Yue Ting v. United States*, the Court expanded upon its holding in *Chae Chan Ping*, broaden-ing the scope of Congress's plenary power over immigration to deportation as well as exclusion.[68] At issue was a federal law which required all Chinese residents of the United States to either apply for a certificate of residence or produce before a judge "at least one white credible witness [that could vouch], that he was a resident of the United States at the time of the passage of this act" or be subject to deportation.[69] Three Chinese laborers, including Fong Yue Ting, failed to obtain the required certificates and were subsequently arrested.[70] In affirming the lower court's judgment ordering the immigrants deported, the Court reiterated its understanding of Congressional power over immigration as unfettered, stating that Congress's decision to deport a certain race of aliens lawfully within the country was a policy that "the judicial department cannot properly express an opinion upon."[71]

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[59] Chae Chan Ping v. United States, 130 U.S. 581 (1889).

[60] Fong Yue Ting v. United States, 149 U.S. 698 (1893).

[61] *See Chae Chan Ping*, 130 U.S. at 582 (quoting the Chinese Exclusion Act of 1882).

[62] *See id.*

[63] *Id.* at 581.

[64] *Id.*

[65] *Id.*

[66] *Id.* at 606.

[67] *Id.* at 581.

The Court's grant of plenary power over immigration to Congress has allowed the upholding of federal immigration laws that disadvantage certain groups in contravention of the equal protection principles of the Fifth Amendment. By immunizing immigration statutes from the burden of equal protection in *Chae Chan Ping* and *Fong Yue Ting*, the Court provided Congress with the ability to classify individuals on the basis of race. As Justice Frankfurter noted in his concurrence in *Harisiades v. Shaughnessy*, "whether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress."[72] While similar decisions given by the Fuller Court during the late nineteenth century have not only been overturned but disgraced, most notably *Plessy v. Ferguson*, the Supreme Court has repeatedly refused to abandon the plenary power doctrine. This refusal to review federal immigration laws has afforded courts the ability to uphold Congressional statutes which violate fundamental constitutional principles regarding individual rights. As Gabriel Chin has observed, "[i]n recent decades, [the federal circuit and district courts] have said not only that aliens may be excluded or deported on the basis of race without strict scrutiny, but also that such racial classifications are lawful per se."[73] As a result of the sweeping language of *Chae Chan Ping* and *Fong Yue Ting*, Congress has passed blatantly racist federal immigration laws that have adversely affected the constitutional rights of immigrants as well as U.S. citizens.

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[68] Fong Yue Ting v. United States, 149 U.S. 698, 712 (1893).

[69] *Id.* at 701.

[70] *Fong Yue Ting*, 149 U.S. at 712.

[71] *Id.*at 731.

[72] Harisiades v. Shaughnessy, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring).

During World War II, the perceived threat of the Japanese on American soil resulted in the imprisonment of thousands of Japanese immigrants and U.S. citizens in internment camps across California.[74] In part because of the internment of a significant portion of the work force, as well as the manpower shortage caused by the war, substantial opportunities arose for Latinos in America.[75] Yet, the peace caused by war for Mexican immigrants was short lived. In response to the economic competition caused by undocumented immigrant workers and the return of soldiers from abroad, Congress enacted "Operation Wetback." As a result, an estimated one million Mexicans and U.S. citizens of Mexican origin were deported.[76] The impregnable fortress surrounding federal immigration law has thus been used to affect not only the individual rights of those outside of U.S. borders, but has also been used to justify the infringement of U.S. citizens' rights based solely upon their race or national origin.

B. The Modern Interpretation of the Plenary Power Doctrine

While the Court has been virtually unyielding in its interpretation of the federal government's power to exclude as absolute, time has nonetheless chewed some minor moth holes in the plenary power doctrine. The Court has held in certain cases it has the power to review the constitutionality of federal immigration laws. However, this judicial responsibility is extremely limited, giving great deference to the legislature and reviewing the statute only for rationality or some "facially legitimate and bona fide reason."[77]

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[73] *See* Chin, *supra* note 15, at 3-4.

[74] *See* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942); *see also* Korematsu v. United States, 323 U.S. 214 (1944) (sustaining the constitutionality of the evacuation order under public necessity, not immigration law).

[75] *See* BELL, *supra* note 50, at 729.

[76] See Eli J. Kay-Oliphant, Comment, *Considering Race in American Immigration Jurisprudence*, 54 EMORY L.J. 681, 700-02 (2005).

In *Kleindienst v. Mandel*, the Supreme Court reiterated that Congressional power to exclude continued to be absolute and immune from judicial intervention, despite its implication of some U.S. citizens' First Amendment rights.[78] At issue in *Mandel* was the Attorney General's discretionary denial of a temporary visa for Ernest Mandel, a Belgian journalist and Marxist, under an INA provision which barred entry of aliens who advocated the doctrines of world communism. Claiming that the denial of visas to people of certain beliefs infringed on their First Amendment right to associate with certain people, the plaintiffs, academics who planned to hear Mandel speak, challenged the constitutionality of the INA statute.[79] Although recognizing the plaintiffs' First Amendment rights, the Court nonetheless held that when the Attorney General's decision to exclude a certain alien is based on a "facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the [constitutional interests of U.S. citizens]."[80] While *Mandel* reinforced the plenary power of Congress to prohibit entry of entire classes of people, it also indicated the Court's willingness to subject certain discretionary decisions to limited judicial review.

Five years later, the Court struck another blow to the plenary power doctrine in *Fiallo v. Bell*. In *Fiallo*, an unwed natural father and U.S. citizen challenged a provision of the INA on equal protection grounds, as it refused to grant special immigrant status to illegitimate children of U.S. citizen fathers while permitting the status for alien children of unwed U.S. citizen mothers.[81] Relying on the plenary power doctrine, the Court upheld the statute as it was "largely immune from judicial review."[82] The Court, however, did not concede that the plenary power doctrine barred substantive admission criteria from judicial review.[83] In explaining the scope, the Court indicated it has recognized the existence of "a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens."[84] In doing so, the Court expanded upon the holding of *Mandel*, which allowed for limited judicial review of non-absolute classifications, by permitting substantive immigration classifications to be tested under the Fifth Amendment.[85]

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[77] *See* Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (refusing to balance the rights of United States citizens against the interests of the government when the immigration statute was facially legitimate); Reno v. Flores, 507 U.S. 292 (1993) (holding immigrant classifications must only withstand a rational basis review).

[78] *Mandel*, 408 U.S. at 770.

[79] *Id.*

[80] *Id.*

The standard of review set by *Fiallo*, however, is not entirely clear. Typically, when a statute or regulation differentiates between people on the basis of gender or legitimacy, the Court will require that the law serves some substantial government interest and that the classification is closely related to achieving that interest.[86] In *Fiallo*, the Court seems to contend that its "limited judicial responsibility" is restricted to a rational basis review and not to the same scrutiny as other domestic laws, even when the classification is based partly on an immutable characteristic of an American citizen. In 1993, the Court reaffirmed its stance declaring that immigration statutes "must . . . meet the (unexacting) standard of rationality advancing some legitimate governmental purpose."[87] Several other lower courts have similarly interpreted the Court's holding and have limited their reviews of federal immigration laws to ensuring rationality.[88] In the 2001 case of *Nguyen v. INS*, the Court applied intermediate scrutiny to an immigration statute which differentiated between the illegitimate alien children of U.S. citizen fathers and mothers.[89] As the Court found no equal protection violation, it determined "we need not assess the implications of statements in our earlier cases regarding the wide deference accorded to Congress in the exercise of its immigration and naturalization power."[90] Justice O'Connor, dissenting, acknowledged that *Fiallo* requires courts to give great deference to federal laws that regulate the admission of aliens, but contended that the statute at issue regulated citizenship, rather than admission, therefore making *Fiallo* not applicable.[91]

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[81] Fiallo v. Bell, 430 U.S. 787, 799-800 (1977).

[82] *Id.* at 792 (quoting Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953)).

[83] *Id.* at 799-800.

[84] *Id.* at 793.

[85] *Id.* at 799-800; *see* Chin, *supra* note 15, at 64-65.

[86] United States v. Virginia, 518 U.S. 515 (1996) [hereinafter The VMI Case].

[87] Reno v. Flores, 507 U.S. 292, 306 (1993).

[88] *See, e.g.*, Miller v. Christopher, 96 F.3d 1467, 1473 (D.C. Cir. 1996) (Wald, J., concurring), *aff'd*, Miller v. Allbright, 523 U.S. 420 (1998); Hamama v. INS, 78 F.3d 233, 236 (6th Cir. 1996); Ablang v. Reno, 52 F.3d 801, 804 (9th Cir. 1995); Newton v. INS, 736 F.2d 336, 339 (6th Cir. 1984); *see also* Chin, *supra* note 15, at 65-66, n.320.

C. Support for Affirmative Action in International Law

At no point within its text does the Constitution grant Congress the power to regulate immigration. Yet despite the language of the Tenth Amendment and the first section of Article I, the power to control immigration has been routinely acknowledged as federal and not as a power reserved to the states.[92] The earliest immigration cases attempted to entrench this federal power in the Commerce Clause, contending that regulating immigration implicated the federal power to regulate commerce with foreign nations.[93] However, in the aftermath of the Civil War, the Court searched for another avenue in which it could find federal power over immigration that did not "lump the 'huddled masses yearning to breathe free' together with coal and hides."[94] As a result, the Supreme Court began suggesting that Congress's plenary power over immigration was based in the "powers inherent in sovereignty" under international law, rather than under any part of the Constitution.[95] Then, in the

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[89] Nguyen v. INS, 533 U.S. 53 (2001).

[90] *Id.* at 72-73.

[91] *Id.* at 96 (O'Connor, J., dissenting).

[92] *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 854-57 (1987).

[93] *See id.*; *see also* Head Money Cases, 112 U.S. 580 (1884).

[94] Henkin, *supra* note 92, at 856.

[95] *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 126-32 (2002).

1892 case of *Nishimura Ekiu v. United States*, the Court firmly cemented the plenary power doctrine in international law:

> It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.[96]

Not only has the Court's decision in *Ekiu* never been rejected, but it has been repeatedly upheld and expanded.[97]

As such, many commentators have urged the Court to review and revise its immigration law decisions as they have often not reflected changes in international law.[98] As evidence, they provide two significant treaties: The International Convention on the Elimination of All Forms of Racial Discrimination (Race Discrimination Convention),[99] and the International Covenant on Civil and Political Rights (ICCPR).[100] As Professor Chin explains, "[i]f international law ever permitted, or was neutral, on the issue of governmental racial discrimination, it is no longer; modern international law generally prohibits racial discrimination."[101] However, while racial distinctions are clearly disfavored by these two treaties, they are not entirely prohibited in the context of affirmative action programs.[102]

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[96] 142 U.S. 651, 659 (1892).

[97] *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) (stating that the plenary power of a nation to expel undesirable aliens is found "not in the provisions of the Constitution, but in the law of nations").

[98] *See* Chin, *supra* note 15, at 60; *See, e.g.*, Joan Fitzpatrick & William McKay Bennett, *A Lion in the Path? The Influence of International Law on the Immigration Policy of the United States*, 70 WASH. L. REV. 589 (1995); Berta Esperanza Hernandez-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs and Legal Fixes: An International Human Rights Critique of Immigration and Welfare "Reform,"* 71 S. CAL. L. REV. 547 (1998); James A.R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804 (1983).

[99] G.A. Res. 2106 (XX), U.N. Doc. A/RES/2106 (Jan. 19, 1966) [hereinafter Race Discrimination Convention].

[100] International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR].

[101] Chin, *supra* note 15, at 60.

[102] *See* Jordan J. Paust, *Race-Based Affirmative Action and International Law*, 18 MICH. J. INT'L L. 659 (1997).

The Race Discrimination Convention generally prohibits racial discrimination, demanding that the signatory nations "engage in no act or practice of racial discrimination."[103] Article 1 of the Race Discrimination Convention, however, expressly relieves certain race-conscious affirmative action programs from the stigma of "discrimination' under the treaty.[104] Furthermore, while the ICCPR generally provides that race-based discrimination is impermissible, the United States adopted the covenant with the "understanding" that certain forms of race-conscious affirmative action plans are permitted, but only when the racial distinctions are "at minimum, rationally related to a legitimate governmental objective."[105] Therefore, while international law may prohibit immigration statutes which clearly discriminate against individuals on the basis of race, it would seemingly uphold race-conscious laws that are targeted at correcting de facto discrimination, such as the achievement gap.

Furthermore, domestic courts could also uphold the statute absent the crutch of the plenary power doctrine as courts are, to the extent possible, to presume that Congressional statutes conform to international law, absent a clear Congressional statement to the contrary.[106] The "*Charming Betsy* rule," as it is often referred, has been frequently used by the Court to reconcile seemingly contradictory provisions of Congressional statutes and international treaties.[107] Therefore, despite the INA's general prohibition on discrimination on the basis of "race, sex, nationality, place of birth, or place of residence,"[108] the Court's explicit designation of the plenary power doctrine as a descendent of international law–and not the Constitution–may provide further justification for race-conscious affirmative action programs that do not have to withstand strict scrutiny. As such, Congress could enact an immigration statute that regulates removal or entry of immigrants based upon race-conscious criteria, provided it also corrects some form of de facto discrimination.

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[103] G.A. Res. 2106 (XX), *supra* note 103, at pt. I, art. 2. § (1)(a).

[104] *Id.* at art. 1, § 4 (excluding affirmative action programs from being defined as "discrimination"); *see also* Paust, *supra* note 102, at 665.

[105] S. Exec. Rep. No. 102-23, at 22 (1992), *as reprinted in* 31 I.L.M. 648, 659; *see also* Paust, *supra* note 106, at 661-62.

[106] *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); *see also* Shayana Kadidal, *"Federalizing" Immigration Law: International Law as a Limitation on Congress's Power to Legislate in the Field of Immigration*, 77 FORDHAM L. REV. 501, 507 (2008).

[107] *See* Kadidal, *supra* note 106, at 507 (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 436-41 (1987)).

[108] 8 U.S.C. § 1152(a)(1)(A).

III. AN END TO CATCH-AND-RELEASE IMMIGRATION: KEEPING FOREIGN STUDENTS IN THE UNITED STATES

A. Immigrant Desire to Come to America

> People in the Ministry had told her rules were changing. So she had made Beatrice study night and day, day and night. All that money Tante had invested in her education, what was it worth? Sonny had won. So what now? What now? Reme, Tante, everybody had depended on her to get [a] big scholarship, to go away, to help Reme, to build [a] big house, to give them a chance to boast that she was in America. What they would do now? What she would do now? Become a seamstress?[109]

In *You Alone Are Dancing*, Brenda Flanagan tells the story of Beatrice Salandy, a young woman living on the fictitious Caribbean island of Santabella, struggling to deal with the realization that despite years of hard work and unlimited potential, the possibility of higher education in America has been relegated to a dream lost behind the hum of a sewing machine.[110] Throughout the world, many countries' brightest minds yearn for the chance to come to the United States to further their educations in hopes they may establish themselves and change the course of their fortunes. While many never get that opportunity, those that do generally take advantage of it.

The foreign-born student population in the United States represents some of the brightest minds in the world.[111] As U.S. colleges and universities are generally better funded, better endowed, and more independent than their international counterparts, they typically attract many of the most talented students in the world.[112] For example, of all engineering Ph.D.'s awarded to Indian-born students in the United States, seventy-eight percent of the students had graduated from an Indian Institute of Technology (IIT), a network of schools that accepts only two thousand of the one hundred thousand applications the IITs receive each year.[113] As Professor Bhagwati and Rao observe, "[o]ur investment in foreign graduate students . . . taps into the exceptionally talented—doubly screened by foreign institutions and our own."[114] The consequences have been an enormous benefit for U.S. universities and the economy as a whole.[115] While the allure of U.S. universities certainly contributes to the large number of foreign students who immigrate to the United States each year, the possibility of becoming a U.S. citizen after graduation is also an attraction.[116]

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[109] BRENDA FLANAGAN, YOU ALONE ARE DANCING 36 (The University of Michigan Press 1996).

[110] *Id.*

[111] Jagdish Bhagwati & Milind Rao, *The U.S. Brain Gain–At the Expense of Blacks?*, 39 CHALLENGE 50, 51 (1996).

These students, however, come to the United States as nonimmigrants, often being forcefully returned to their homelands, despite their desire to remain in the country.[117] For example, of all 2003 foreign-born doctorate recipients in the United States, by 2004 only sixty-eight percent remained in the United States and by 2005 that number shrank to sixty-six percent.[118] Even more telling is that the percentage of students who claimed an intention to stay in the United States after graduation significantly exceeded the number of students who actually remained.[119] Currently, more than 250,000 international students roam U.S. universities, and after a few years of decreased applications, the number is once again on the rise.[120] Upon graduation, however, many of these students have little choice but to return to their homelands.

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[112] Joseph Tiger, Note, *Re-Bending the Paperclip: An Examination of America's Policy Regarding Skilled Workers and Student Visas*, 22 GEO. IMMIGR. L.J. 507, 516-19 (2008).

[113] *See* Bhagwati & Rao, *supra* note 113, at 51. Bhagwati and Rao also cite Korea, Taiwan, and the People's Republic of China as other examples. For instance:

> Almost half (48 percent) of all Taiwanese students who receive Ph.D.'s in the United States attend either the National Taiwan University or Chen Kung University. Even more telling, 65 percent of the Korean students who receive science and engineering Ph.D.s in the United States were graduates of one university - Seoul National University.

Id.

[114] *Id.*

[115] *Id.*

[116] *Id.*; STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 381-84 (4th ed. 2005).

[117] 8 U.S.C. § 1101(a)(15)(F)(i) (2006).

[118] Michael G. Finn, Stay Rates of Foreign Doctorate Recipients from U.S. Universities, 2005 2 (Oak Ridge Institute for Scientific Education 2007).

The most common provision that nonimmigrant students use to remain in the U.S. after graduation is the H-1B "specialty worker" visa.[121] The H-1B visa essentially provides an employer who wishes to hire a foreigner to fill a vacancy in a "specialty occupation," the option of submitting a detailed form, which describes the nature of the position and the position's prevailing wage according to industry standards.[122] This option only affects a very minimal number of the 671,616[123] foreign students currently enrolled in U.S. colleges and universities. The Immigration and Nationality Act has issued an annual quota of effectively 85,000 specialty worker visas[124], thereby leaving many foreign students frustrated in their search for American employment. Furthermore, as one of the few visas that allow nonimmigrants to enter the United States with an intention to remain, the H-1B is in extremely high demand. For example, the U.S. Citizenship and Immigration Services (USCIS) announced on April 7, 2008–exactly one week after H-1B visa petitions could be submitted–that it had received enough petitions to satisfy the 85,000-visa quota for 2009.[125] The result has been a combination of highly educated foreign students returning to their homelands and an increase in illegal immigrants in the United States denying American citizens jobs.[126] The "golden doors" and the chance for permanent resident status or even citizenship, therefore, can work as a lure to entice highly educated immigrant students to remain in the U.S. and work in areas where there is a critical need: low-income, high-minority public schools.

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[119] *Id.* at 11-12.

[120] *See* Wadhwa, *supra* note 19. After the terrorist attacks of September 11, 2001, many commentators concluded that the foreign student visa program was a threat to national security. As a result, much stricter foreign student laws were enacted, thus causing a decrease in the number of foreign students in the United States. *Id.*

[121] 8 U.S.C. § 1101(a)(15)(H)(i)(6) (2006).

[122] 8 U.S.C. § 1184(c) (2006); 20 C.F.R. § 655.731 (2007).

[123] *See* INSTITUTE OF INTERNATIONAL EDUCATION, OPEN DOORS 2009 REPORT ON INTERNATIONAL EDUCATIONAL EXCHANGE fig. 1A (Apr. 2010); *c.f.* OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SECURITY, 2009 YEARBOOK OF IMMIGRATION STATISTICS tbl. 25 (Apr. 2010) (indicating that 951,964 nonimmigrant student visas where given out in 2009 alone).

[124] *See* 8 U.S.C. §§ 1184(g)(1)(A)(viii), 1184(g)(5)(C) (2009). The INA has placed a 65,000-visa limit on nonimmigrant specialty workers; however, it has also allocated an additional 20,000 H-1B visas for foreign students who have degrees at the master's level or above. *Id.*

[125] U.S. Citizenship and Immigration Services, *USCIS Reaches FY 2009 H-1B Cap* (April 8, 2008), http://www.uscis.gov/files/article/H-1B_8Apr08.pdf; *see also* Wadhwa, *supra* note 19.

B. The Proposed Statute

The first portion of the proposed statute would operate much like INA § 214(g)(5)(C), which authorizes an additional 20,000 H-1B visas to nonimmigrants who have earned "a master's or higher degree from a United States institution of higher education."[127] It would offer an additional 40,000 H-1B visas to nonimmigrant foreign students currently within the United States on F-1 visas who have (1) either (a) earned a bachelor's or higher degree from a U.S. institution of higher education, or (b) are scheduled to earn a bachelor's or higher degree from a U.S. institution of higher education within two months after the first day of April; (2) have received an offer of full-time employment to teach in a public school that (a) has a predominantly minority student body,[128] (b) is within the United States, (c) has consistently failed to meet the standards set by its state's assessment tests and the No Child Left Behind Act, and (d) has demonstrated a sufficient need for teachers in this position; and, (3) have agreed to remain employed by this school in this position for six continuous years.

The second portion of the statute would address the timing concerns for F-1 students who are applying for H-1B visas. Because H-1B applications are not accepted until April 1 and most college and university graduations are well after this date, the majority of F-1 students have to wait an entire calendar year for any potential employer to file an H-1B petition on their behalf. Although Congress has recently amended the amount of time an F-1 student may stay in the United States after graduation for Optional Professional Training (OPT), the OPT program severely curtails the employment opportunities for these students. Furthermore, even if a student's H-1B visa is granted, he must wait until the beginning of the fiscal year in October to begin employment, a date which is generally weeks after the start of the school year.[129] For this reason, the proposed statute would move back the application date to the first day of March and delay issuance of these 40,000 H-1B visas until the first day of August, but have them count against the current fiscal year.

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[126] Being unable to secure another visa, many of these students are forced to choose whether to return to their homelands after graduation or remain in the United States illegally and risk deportation. *See Who's Keeping Track? Foreign Students Often Remain After Their Visas Expire*, ABC NEWS 20/20 (Nov. 14, 2001).

[127] 8 U.S.C. § 1184(g)(5)(C) (2006).

[128] "Predominately minority school" will be defined as any pre-university public school which has a seventy percent or higher minority student population.

The third portion of the statute would address adjustment of status. The proposal would provide that upon maintaining employment in the same under-performing, predominately minority public school for six continuous years, the nonimmigrant's specialty worker status will automatically be adjusted to that of legal permanent resident. Finally, the statute would provide that upon voluntary loss of employment, the H-1B visa would expire and the nonimmigrant would be ineligible for another employment-based visa for four years. This provision would hopefully discourage aliens from using this teaching visa as a temporary holdover until a better opportunity presented itself.

C. How Would This Statute Benefit U.S. Public Schools?

A variety of different schools and school districts have gone to great lengths to fill their ever increasing teacher vacancies. As reported in the *New York Times*, Guilford County, North Carolina, has resorted to nationwide advertising campaigns and hiring incentives of $10,000 for instructors who sign up to teach Algebra I.[130] In New York, prospective educators in math, science and special education are lured by a $5,000 real estate incentive, and in Los Angeles, officials are offering a $5,000 bonus to educators who agree to teach in underperforming schools.[131] In 2007, U.S. school districts spent nearly seven billion dollars recruiting, hiring and training their teachers with the majority being spent by the schools that could least afford it.[132] As a result of increased expenditures on hiring and training replacement teachers, schools have been forced to both cut what may be viewed as non-essentials, such as sports programs, summer school, music and art programs, and driver's education, while also terminating many employees, such as custodians and food service personnel.[133] By implementing the proposed statute, school districts can significantly reduce their annual overhead by eliminating the majority of the money spent on teacher recruitment every year. Furthermore, because the statute requires six years of continuous teaching, schools may also reduce the amount of money spent on retraining new teachers every year.

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[129] 8 U.S.C. § 1184(g)(1)(A)(vii) (2006).

[130] Sam Dillon, *With Turnover High, Schools Fight for Teachers*, N.Y. TIMES, Aug. 27, 2007, at 1, http://www.nytimes.com/2007/08/27/education/27teacher.html?_r=3.

Other school districts have attempted to use the H-1B visa program and the J-1 "cultural exchange" visa to procure nonimmigrant teachers to fill their empty classrooms.[134] Although these programs have been relatively successful, they have resulted in harsh criticism for a variety of reasons, including, (a) the inability of the immigrant teachers to assimilate to American culture, (b) the added expense of finding and procuring visas for nonimmigrant teachers, and (c) the validity of professional certification from other countries.[135] Using foreign students helps eliminate these three concerns. First, students who have obtained bachelor degrees from U.S. universities and colleges have typically experienced four years of American culture and have become assimilated to it. After four or more years, many foreign students begin to consider America as their home.

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[131] *Id.*

[132] *Id.*

[133] Andrea Billups, *School Budget Cuts Threaten Gains*, WASH. TIMES, Mar. 11, 2009, at A1, http://www.washingtontimes.com/news/2009/mar/11/schools-cut-budgets-where-it-hurts.children-most/.

[134] *See* David Dishneau, *N.C. Firm Sending Foreign Teachers into Maryland Schools*, NEWSOBSERVER.COM, July 24, 2005, at 1, http://www.nctq.org/research/1125326186163.pdf; *see also* Antonio Planas, *Clark School District Recruits Teachers in Philippines*, LAS VEGAS REVIEW-JOURNAL, Mar. 28, 2005, http://www.reviewjournal.com/lvrj_home/2005/Mar-28-Mon-2005/news/ 26153393.html.

[135] Dishneau, *supra* note 134, at 1-2.

The second significant complaint that has arisen from school districts hiring of nonimmigrant teachers has been the extra cost associated with it. In 2005, facing a substantial teacher shortage, Washington County, Maryland, hired the Visiting International Faculty Program (VIF), a for-profit company that secures cultural exchange visas for foreign teachers, to fill ten hard-to-fill positions in their public schools.[136] Although the consensus from school districts that have used VIF is that the teachers have been a success, each VIF teacher costs the district about $1,300 a year more than a "nonimmigrant" teacher.[137] A federal program which allows states to petition for these teachers frees up some of the funds spent by school districts in trying to secure enough teachers for their schools to function properly.

Finally, the validity of the students' teacher certification should not be an issue as they (1) would have received it from an accredited U.S. university, and (2) the substantial competition for these visas should allow schools to secure only the best prospective teachers available. Aside from the specific complaints that have followed the use of nonimmigrants to fill teacher vacancies, a more general concern surrounding immigration exists in the native-born minority communities of the United States.

D. Immigrants and the Native-Born Minority Community

Certainly, the intersection of race and immigration has been a contentious issue as the United States stands as a beacon of hope and opportunity for many immigrants, yet for many African-Americans it represents a land of oppression and limited mobility.[138] In this "nation of immigrants," African-Americans are quick to point out that they are not descendants of immigrants, but of slaves.[139] As the economic prospects for U.S. workers lacking a college education continues to diminish and the achievement gap continues to exist, immigrant workers and students have generally been a cause of alarm in the African-American community. And for good reason.[140] Studies have been performed which indicate that immigration has resulted in lower levels of native born minority students graduating high school[141] and obtaining higher education.[142] Furthermore, many commentators contend the increase of foreign born students in American universities has resulted in the reduction of the number of black Ph.Ds,[143] and that positive impact received by the United States from immigration has resulted in adverse economic effects for blacks.[144]

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[136] *Id.* at 1.

[137] *Id.* at 2. (I believe his use of the term Anonimmigrant@ refers to non-foreign, not an H-1B visa.).

[138] *See* THE IMPACT OF IMMIGRATION ON AFRICAN AMERICANS 12 (Steven Shulman ed., Transaction Publishers 2004).

The results of these studies have fueled an anti-immigrant sentiment in the African-American community, premised on the notion that they have waited for these limited opportunities, and recent immigrants have cut in line and stolen them away.[145] However, as Professor Ikemoto observes, this understanding of African-American entitlement "assumes that the competition must occur among those forced to stand in line, not between those making the handouts and those subject to those handouts."[146] As a result, the conflict between African-Americans and immigrants serves only to reinforce white supremacy. By encouraging immigrants to teach in minority communities, rather than compete for jobs, better race relations between immigrants and native-born minorities may occur.

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[139] *Id.* at 13.

[140] *See* Daniel S. Hamermesh & Frank D. Bean, *Introduction* to HELP OR HINDRANCE? THE ECONOMIC IMPLICATIONS OF IMMIGRATION FOR AFRICAN AMERICANS 1 (Daniel S. Hamermesh & Frank D. Bean, eds., Russell Sage Foundation 1998).

[141] *See* Julian R. Betts, *Educational Crowding Out: Do Immigrants Affect the Educational Attainment of American Minorities? in* HELP OR HINDRANCE?, *supra* note 147, at 253, 253-78.

[142] *See* Caroline M. Hoxby, *Do Immigrants Crowd Disadvantaged American Natives Out of Higher Education? in* HELP OR HINDRANCE?, *supra* note 147, at 282, 282-319.

[143] *See* Anthony DePalma, *Drop in Black Ph.D.'s Brings Debate on Aid for Foreigners*, N.Y. TIMES, Apr. 21, 1992, at 1.

[144] *See* IMMIGRATION AND OPPORTUNITY: RACE, ETHNICITY, AND EMPLOYMENT IN THE UNITED STATES 3 (Frank D. Bean & Stephanie Bell-Rose, eds., Russell Sage Foundation 1999).

[145] *See* Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles"*, 66 S. CAL. L. REV. 1581 (1993). One African-American source that Ikemoto spoke to had this to say about the immigration laws of the United States: "People here are out of jobs and yet they allow foreign people to come over and take work away from people born here in America . . . . [T]hey can come over and get loans and open up businesses, but no one will lend any money to us." *Id.* at 1285 (quoting Phil Reeves, *Riots in America: Divided Community Settles Old Scores*, THE INDEPENDENT, May 2, 1992, at 2 (quoting Rodney Walker)).

For example, the inclusion of Asian teachers into a predominately African American school may help resolve racial tensions between minorities and immigrants by increasing each group's understanding of the culture and experiences of the other. By keeping immigrant groups and native-born minorities separated, identification between the parties can only be based on differences, rather than similarities. As a result, each group perceives the other as a threat toward its own achievement. By putting immigrants into minority-rich classrooms, the two cultures are forced to interact in an academic setting, which hopefully will result in the identification of both commonalities and differences, and the development of solidarity between opposing communities.

CONCLUSION

While the enactment of the NCLB caused test scores across America to improve, the racial achievement gap continues to persist. With the Supreme Court's current standard of review for race-conscious measures in secondary education as announced in *Parents Involved*, only seemingly inadequate policies could ever be upheld. This problem is reinforced by the mass exodus of quality teachers from low-income, high-minority schools to wealthier white schools. As a result, progress toward rectifying the achievement gap has become stagnant. Immigration law, however, may offer a solution. By offering nonimmigrant students who have obtained bachelor or higher degrees at U.S. universities, the ability to procure a temporary work visa and later adjust status to that of legal permanent resident, conditioned upon teaching in a minority-rich school for six years, the critical teacher shortage in many high-minority schools may be rectified, thus resulting in a lessening of the achievement gap.

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[146] *Id.* at 1286.

While many of our pre-university schools continue to fail to educate their students, our post-secondary schools are attracting much of the world's best intellectual talent, providing them with training, and then forcing them to return to their native lands, despite a desire to remain in the United States. By tapping into one of its best resources, the foreign-student population, the United States can not only remedy the critical teacher shortage in many schools, but also significantly reduce the seven billion dollars that U.S. schools districts spend annually on recruiting and training new teachers. Furthermore, by placing immigrant teachers into minority classrooms, the United States can hopefully resolve many of the internal conflicts between the nation's native-born minority communities and recent immigrants.

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